

THE ISRAELI SUPREME COURT'S MYTHICAL IMAGE – A DEATH OF A THOUSAND SOUND BITES¹

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One of the perplexing phenomena in the rise of judicial power in democracies worldwide is the high level of public support given in many countries to these essentially counter-majoritarian institutions. Israel has served for many years as “Exhibit A” in accounts of the rise of judicial power. Yet, following decades of strong public support for the Israeli Supreme Court, there has been a sharp decline since the beginning of this century. Based on an empirical study of television coverage of the Israeli Supreme Court on Channel One evening news broadcasts between 1993 and 1996, I examine a neglected factor in the attempts to explain this decline: the changing media coverage of the Court. I show that the entrance of a second, commercial television channel (Channel Two) in 1993 had a profound impact on the way the Court was depicted. Using both quantitative and qualitative data, I argue that, because of patterns of coverage dictated by the needs of commercial media, the Court’s long-standing mythical image started to crumble in 1993. Contrary to prevalent claims that attribute the change in the Court’s public image solely to developments in its jurisprudence, I show that a shift in the medium covering the Court is partly responsible for the shift in the Court’s public image. With the entrance of infotainment, rather than continuing to present the Court as an institution that decides cases based on legal expertise, television framed the Court more and more as an institution that decides cases based on ideology and even on partisan politics.

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1. A paraphrase based on J.M. Balkin, *What is a Postmodern Constitutionalism?*, 90 MICH. L. REV. 1966, 1980-81 (1992).

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INTRODUCTION

In 2007, Aharon Barak, the former president of the Israeli Supreme Court (the Court), was perplexed. Since 2000, public opinion polls showed a continuing and sharp decline in public confidence in the Court,² yet Barak could not understand the public’s growing dismay with the Court. He confessed: “I am aware that according to our rating, the public support of courts is declining and I ask myself why? I do not think

2. See Or Bassok, *Television Coverage of the Israeli Supreme Court 1968-1992: The Persistence of the Mythical Image*, 42(1) ISR. L. REV. 306, 307 (2009) (surveying public opinion polls data on the decline in public confidence for the Court); ASSAF MEYDANI, *THE ISRAELI SUPREME COURT AND THE HUMAN RIGHTS REVOLUTION* 9, 113 (2011); ARYE RATTNER, *LEGAL CULTURE: LAW AND THE LEGAL SYSTEM IN THE EYES OF THE ISRAELI PUBLIC 2000-2009*, 50-52 (2009) (Isr.) (presenting data demonstrating the decline in public support for the Court between the years 2000 and 2007).

that in recent years we have become worse.”³ This Article offers an answer to Barak’s perplexity. I agree with Barak that the decline in public support for the Court at the beginning of the twenty-first century cannot be explained solely by a change in the Court’s adjudication. The sharp decline in the Court’s public support occurred more than fifteen years after the revolution in the Court’s adjudication began.⁴ Moreover, even the Court’s critics argue that its activism had declined by the end of the 1990s.⁵ Indeed, as Barak stated, the Court did not become “worse” in the years preceding his statement. In this Article, I suggest that only after the media responsible for constructing the Court’s image in the public mind went through a dramatic shift, could a change in public confidence in the Court occur. In the following sections, I depict the change in the Court’s portrayal in television coverage. Based on this depiction, I argue that a shift in the medium presenting the Court to the public, a shift that occurred following the inception of the commercial television channel (“Channel Two”), had a great impact on the change in the portrayal of the Court.

In a previous Article, I showed that, up until 1993, television continued to adhere to a mythical perspective in covering the Court, presenting the Court, by and large, as an institution guided solely by legal expertise. The Court’s growing involvement in public life and in the political arena, occurring during the 1980s, was not sufficient to erode the Court’s mythical image. The Court’s strong public support

3. Rona Tal, *Aharon Barak: Do not Allow the Knesset the Last Word*, YNET, Nov. 21, 2007 (Isr.).

4. See Menachem Mautner, *Law and Culture in Israel: The 1950s and the 1980s*, in *THE HISTORY OF LAW IN A MULTI-CULTURAL SOCIETY: ISRAEL 1917-1967*, 175 (Ron Harris et al. eds., 2002) (summarizing his well-known theory that the 1980s were a revolutionary decade in the Court’s adjudication, characterized by the “decline of formalism and the rise of values”).

5. RUTH GAVISON, MORDECHAI KREMNETZER & YOAV DOTAN, *JUDICIAL ACTIVISM, FOR AND AGAINST: THE ROLE OF THE HIGH COURT OF JUSTICE IN ISRAELI SOCIETY* 66-67 (2000) (“A series of judgments given during the 1990s expresses a different direction in the Court’s adjudication than the activism described above.”); *id.* at 149 (“In recent years, one can detect a tendency of growing caution and awareness in the HCJ’s adjudication, that are responsible for the growing deference in its decisions.”); Moshe Landau, *Judicial Activism*, 8 H’MISPAT 535, 538 (2002) (Isr.).

during these years may be explained by the media's adherence to the mythical prism in its coverage of the Court.⁶

This Article is the second part of an empirical project analyzing the coverage of the Israeli Supreme Court. In the first part, I raised a thesis on the influence of Channel Two's entrance into the arena.⁷ In this Article, I substantiate it. I pick up the story at the point where I left it, and present the rocky years the Court went through between 1993 and 1996. I show that the Court's mythical image began to crumble in Channel One's news television coverage as a result of changes in communication technology, i.e., the entrance of the commercial channel, rather than, as scholars argue, solely due to a shift in the Court's adjudication. This Article shows that because of a change in media that transformed Israeli television from "a televised newspaper" to a medium that gives expression to television's biases as a technology,⁸ the Court, from the mid-1990s or so, by and large, was no longer depicted through the mythical prism.

After presenting the background required in order to understand the work of both the Court and the media during the years examined in the Article, I turn to present my hypothesis. In the third section, I present quantitative data on the coverage of the Court between 1993 and 1996 and explain how the data support my thesis. Next, I present quantitative analysis of several categories of coverage that further supports my hypothesis on the shattering of the Court's mythical image in media coverage. Yet, remnants of this dominant mythical prism remained and in the following section I present their manifestations. Before concluding, I examine several competing theories that explain the shattering of the Court's mythical image without referring to a change in

6. See Bassok, *supra* note 2, at 356-57 ("Television's only channel, for twenty-five years continued to portray the Court in mythical terms. Although not focusing on the question of the Court's institutional legitimacy, a study of newspapers' coverage supports this conclusion.").

7. See Bassok, *supra* note 2, at 308-09, 361.

8. See NEIL POSTMAN, *AMUSING OURSELVES TO DEATH* 85 (1986) ("There are many places in the world where television, though the same technology as in America, is an entirely different medium from that which we know. I refer to those place where . . . only one station is available . . ."); YORAM PERI, *TELEPOPULISM* 40 (2004) ("During the twenty years of monopolistic public service television . . . Israel, in fact still remained in the era of print journalism. The era of visual culture, the 'neotelevision era,' began with the commencement of broadcasting by Channel 2, the commercial channel.").

the medium. In my concluding remarks, I offer some thoughts on media coverage of national high courts as an important factor for understanding public support given in many countries for the rise of judicial power.

I. BACKGROUND

1. The Media Coverage of the Court until 1992

The Court had three functions during the period of this study: hearing appeals from district courts as a criminal appellate court; hearing appeals as a civil appellate court; and serving as the High Court of Justice (HCJ).⁹ In its HCJ capacity, the Court operated as a court of first and last instance, adjudicating thousands of petitions each year against public agencies exercising their legal powers.¹⁰ Since the mid-1980s the Court significantly relaxed the rules of standing and lowered the barriers of non-justiciability.¹¹ Thus, in the period between 1993 and 1996, there was hardly any controversy on the Israeli public agenda that did not, sooner or later, reach the Supreme Court.¹²

Until the inception of Channel Two in 1993, Channel One was the sole Israeli television channel available, and thus, it received very high ratings. According to opinion polls, the main news edition (“*Mabat*”) had average ratings of 70% (and some claim up to 90%) of the Israeli

9. See Yoav Dotan, *Judicial Rhetoric, Government Lawyers, and Human Rights: The Case of the Israeli High Court of Justice during the Intifada*, 33 LAW & SOC’Y REV. 319, 322-23 (1999).

10. In 2000 Administrative Courts were established as separate chambers of the District Courts. While their jurisdiction is still limited, in issues under the District Courts jurisdiction the Supreme Court serves as an administrative appellate division. See Administrative Courts Act, 2000, S.H. 190 (Isr.).

11. See, e.g., Ruth Gavison, *The Israeli Constitutional Process: Legislative Ambivalence and Judicial Resolute Drive*, 11 REV. CONST. STUD. 345, 370 (2006) (noting that the Court “expanded its jurisdiction by letting go of all requirements of standing, by abolishing in fact the political question doctrine”). Accord Ran Hirschl, *The Socio-Political Origins of Israel’s Juristocracy*, 16 CONSTELLATIONS 476, 478-79 (2009).

12. See RAN HIRSCHL, TOWARDS JURISTOCRACY 1, 74 (2004); Yoav Dotan, *Judicial Accountability in Israel: The High Court of Justice and the Phenomenon of Judicial Hyperactivism*, 8(4) ISR. AFFAIRS 87, 97 (2002) (“[T]he HCJ became a key player within the Israeli polity. There is hardly a political controversy, an issue of public importance or a contemporary moral dilemma that does not find its way, sooner rather than later, as the subject of a petition to this judicial forum.”).

population.¹³ Hence, at that period, *Mabat* had a crucial role in defining the borders of the Israeli public mind and thus was considered by many to be Israel's "campfire."¹⁴

Although the Court had gone through a revolutionary decade during the 1980s, becoming deeply involved in almost every aspect of Israeli political life, the coverage of the Court by the sole television channel continued to adhere to the mythical image, as it had from the inception of television in Israel in 1968.¹⁵ A study of the coverage of the Court in newspapers also demonstrates a similar commitment to the mythical image during those years.¹⁶ The distinction between law and politics remained firm in media coverage, even though the Court shifted from a formalist language to a language of values and policy considerations.¹⁷ The Court was presented as deciding on the basis of legal considerations, even when it intervened in the political arena.¹⁸ The mythical prism was so powerful that other alternatives for imagining the Court were just not visible in the media during that period, prior to the entrance of Channel Two. Thus, these alternatives were beyond the boundaries of how Israelis collectively imagined the Court.

The 1980s and the beginning of the 1990s was an intoxicating period for the Israeli Supreme Court. Contrary to scholarly predictions,¹⁹ public

13. See Bassok, *supra* note 2, at 319.

14. OZ ALMOG, FAREWELL TO 'SRULIK'—CHANGING VALUES AMONG THE ISRAELI ELITE 291 (2004) (Isr.). See also, OREN SOFFER, MASS COMMUNICATION IN ISRAEL 251-53 (2011) (Isr.).

15. See Bassok, *supra* note 2, at 357-59 ("[T]he Court acquired an increasingly central role in Israeli public life without significantly eroding its mythical image.").

16. See Bryna Bogoch & Yifat Holzman-Gazit, *Mutual Bond: Media Frames and the Israeli High Court of Justice*, 33 LAW & SOC. INQUIRY 53, 55, 77, 79 (2008).

17. See MENACHEM MAUTNER, LAW & CULTURE OF ISRAEL 90-95 (2011) (discussing the change in the Court's discursive practices).

18. See Bassok, *supra* note 2, at 351-53 ("[T]he mythical image was so persistent that instead the Court's actions were presented as apolitical, standing in direct contrast with the wheeling and dealing of the political arena.").

19. See Alfred Witkon, *The Substantive Right in Administrative Law*, 9 IYUNEI MISHPAT 5 (1983), reprinted in JUSTICE AND THE JUDICIARY 147, 150-51, 167 (1988) (Isr.); GAVISON, KREMNITZER & DOTAN, *supra* note 5, at 65 ("At the beginning of the 1980s, when the trend of intervention began, the senior judges of the Supreme Court (led by Judges Witkon and Landau) warned of over-intervention by the Court in sensitive matters that are subject to controversy They predicted that such intervention will lead . . . in the end, to a decline in its public position.").

support for the Court remained well above 90%,²⁰ even though the Court became more and more active and involved in the political arena. Studies based on public opinion polls revealed that, during that period, the public's enduring support was based on the Court's mythical image as a neutral, objective, and apolitical expert that reaches its decisions in accordance with the law.²¹

2. Channel Two Enters the Arena

The inception of Channel Two in November 1993, coupled with the entrance of satellite channels during the 1990s and, to a lesser extent, the creation of a second commercial channel (Channel 10) in January 2002, brought a sharp decline in the ratings of *Mabat*.²² Surveys conducted in 1995 and 1996 showed that between 30% and 31% of the population watched *Mabat*.²³ The "people meter" system,²⁴ that in 1998 replaced the conflicting ratings data from surveys conducted by the two channels, showed that at the beginning of 1998, *Mabat* still received higher ratings than Channel Two's news edition. According to this data, in July 1998 Channel Two's news edition not only began receiving higher ratings than *Mabat*, but also became the most watched television program for substantial periods.²⁵

20. See GAD BARZILAI, EPHRAIM YUCHTMAN-YA'AR & ZEEV SEGAL, *THE ISRAELI SUPREME COURT AND THE ISRAELI PUBLIC* 76 (1994) (Isr.) (noting in 1991, 78.1% of the Jewish public had high trust in the Court, and 17.7% had some trust). For a short summary of this study in English, see Gad Barzilai, *Courts as Hegemonic Institutions: The Israeli Supreme Court in a Comparative Perspective*, in *ISRAEL—THE DYNAMICS OF CHANGE AND CONTINUITY* 15 (David Levi-Faur et al. eds., 1999).

21. See BARZILAI, YUCHTMAN-YA'AR & SEGAL, *supra* note 20, at 60-62, 72-76; Barzilai, *supra* note 20, at 15-17, 21, 25-26, 30; Gad Barzilai, *The Political and Legal Culture in Israel in 2 TRENDS IN ISRAELI SOCIETY* 707, 790 (Ephraim Ya'ar & Ze'ev Shavit eds., 2003) ("[T]he Supreme Court enjoyed mythical presentation as a neutral, *mamlachti* [above sectarian interests], non-partisan institution thus naturally gaining high public legitimacy.").

22. See PERI, *supra* note 8, at 13, 18-19, 123.

23. Orly Bar-Kima, *An Item with David Levi was Censored and not During the Election Propaganda*, HAARETZ, May 15, 1996 (Isr.) (reporting several public opinion polls).

24. See *How Does It Work*, The Israeli Audience Research Board, <http://www.midrug-tv.org.il/index.php?dir=site&page=content&cs=3030>.

25. See *Rating*, The Israeli Audience Research Board,

While Channel One is a public broadcaster following the BBC model; Channel Two is a commercially financed station supervised by a council appointed by the Government.²⁶ The news editions in Channel Two are produced by a news company. Although the company is controlled by the same commercial franchisees that control the channel, according to the Second Authority for Television and Radio Act, the news should not reflect the positions and opinions of the commercial franchisees.²⁷

In the era before the inception of Channel Two, *Mabat* was described as resembling “something of a televised newspaper” or a “photographed radio.”²⁸ The style of coverage was “heavy, deadly serious,” and no different to the style characteristic of the Israeli media before the inception of televised news.²⁹ The Channel Two news edition imported prevailing tendencies from the American media market to Israel. It conducted itself as a real industry, acting out of commercial considerations with the goal of maximizing profits.³⁰ Thus, since the way to maximize profits in television is to provide large amounts of entertainment, the age of infotainment and market-driven journalism arrived in Israel. The news editions became not only a conduit for presenting information but also a medium oriented towards entertaining viewers. What will keep viewers watching the news became a central aim in choosing and framing new content. This was the ideology of this new technology.³¹ Thus, sensationalist coverage of news events became prevalent. News narratives that dramatized, personalized and simplified complex issues were now preferred.³² For commercial media,

<http://www.midrug-tv.org.il/index.php?dir=site&page=rating> (search according to “weeks beginning in”).

26. See Gideon Doron, *The Politics of Mass Communication in Israel*, 555 ANNALS AM. ACAD. OF POL. AND SOC. SCI. 163, 174-75 (1998).

27. The Second Authority for Television and Radio Act, 1990, provision 64 (Isr.).

28. See Doron, *supra* note 26, at 170; PERI, *supra* note 8, at 40-41, 125.

29. See PERI, *supra* note 8, at 125.

30. See PERI, *supra* note 8, at 25-26; ANAT PELEG, OPEN COURT 10 (2012) (Isr.).

31. See POSTMAN, *supra* note 8, at 84-88 (“Entertainment is the supra-ideology of all discourse in television.”).

32. See PERI, *supra* note 8, at 41-42, 121-26 (“[T]elevision’s way of treating political materials: presenting politics as a game, emphasizing its personal dimension, and accentuating human interest and the sensational.”); ALMOG, *supra* note 14, at 242-43.

“everything is about personal politics,” rather than the work of abstract forces or ideas.³³

These changes were not restricted to Channel Two. Although its revenue is provided by license fees and not by commercials, Channel One also adopted the ratings principle as its guiding star and became more and more adapted to the “sound bites” era. Items were shortened and newsworthiness was determined by the ability to show pictures. An empirical study showed no major differences between the two news editions in terms of length of news items, position in the lineup and presentation style.³⁴ Moreover, scholars argue that the popular press also went through a process of “televisionization,” adopting many of the features of commercial television news coverage.³⁵

II. MY HYPOTHESIS, RESEARCH LIMITATIONS & METHOD

In examining changes to the Court’s public image during the 1990s, scholars have overlooked changes in the media. They have pointed to changes in the Court’s adjudication or changes in the elites’ disposition towards the Court as causes for changes in its public image.³⁶ Yet, as I show below,³⁷ these explanations are flawed or incomplete in explaining the shift in the Court’s public image. Media scholars who focused on the effects of the inception of the commercial channel on the way we imagine institutions detected changes regarding only the work of the

33. See DAVID M. RICCI, *GOOD CITIZENSHIP IN AMERICA* 199, 215-16 (2004).

34. See Gabriel Weinman & Ayelet Goren, *Sobriety and Ratings Met Halfway*, 16 PANIM 4 (2001) (Isr.); see also PERI, *supra* note 8, at 26-27, 41, 125 (“Knowing how much the Israelis love and need politics, television editors did not hasten to remove political material from the screen but turned it into entertainment, first in the commercial channel and soon after in the public channel.”).

35. See PERI, *supra* note 8, at 43-44. “The press itself has undergone a process of ‘televisionization.’” *Id.* at 99.

36. See, e.g., Dan Avnon, *The Israeli Basic Laws’ (Potentially) Fatal Flaw*, 32 ISR. L.R. 535, 538, 543 (1998) (arguing that the Court’s decisions on the definition of Israel as a “Jewish and democratic state” in the 1992 basic laws brought fierce public criticism of the Court); Menachem Hofnung, *Israeli Constitutional Politics: The Fragility of Impartiality*, 5 ISR. AFFAIRS 34, 36 (1999) (arguing that the “grant” of the authority to review legislation in the 1992 Basic Laws, “has caused the courts to be publicly perceived as partisan actors in the political arena, whereas previously they were viewed as neutral.”).

37. See *infra* section VIII.

legislature and executive.³⁸ Based on this literature, my hypothesis is that the Court was not immune to these effects. Commercial media's tendency to cover issues through the prism of low politics, its preference for conflict and drama and its attempt to sensationalize issues are all incompatible with the Court's mythical image.³⁹ More generally, the commercial media's biases may be in conflict with any attempt to preserve an image of expertise of institutions that are publicly salient. It tends to transform disputes about policies or values into contests for political and personal advantage.⁴⁰ This simplified all-inclusive frame that "everything is personal" conflicts directly with the national high courts' attempt to sustain an image of legal experts. Hence, I hypothesize that the shift from Channel One's "campfire," to a world of commercial television had dire effects on the Court's mythical image.

In my previous Article, I argued that even though the Court became very active and involved in the political arena, grim assessments of the decline in its public support did not materialize since media coverage did not change and the Court continued to be presented through a mythical prism.⁴¹ This Article depicts a major shift in the manner the Court was covered by Channel One's news edition. It does not examine the coverage of the Court by Channel Two or by other media venues such as newspapers. Although, as explained above, there is a solid basis for the assumption that tendencies in the media coverage of the Court portrayed in this Article were the same (or perhaps even stronger) in Channel Two's news coverage, further empirical research is still required in order to substantiate this assumption.⁴²

38. See PERI, *supra* note 8, at 132-39 (titling the sections on television's effect on the branches of government "The Knesset: From Workhorses to Showhorses" and "The Government: From Weaving a Future to Blowing Bubbles").

39. See, e.g., WILLIAM HALTOM, REPORTING ON THE COURTS—HOW THE MASS MEDIA COVER JUDICIAL ACTIONS 74, 91, 110-11 (1998) ("We expect commercial biases to prey upon television reporters, editors, and executives to a greater degree than for respective decision makers at newspapers Expect more emphasis on 'infotainment' and dramatization because televised pictures tend to become the whole story and spectacle overwhelms analysis.")

40. See JOHN R. HIBBING & ELIZABETH THEISS-MORSE, STEALTH DEMOCRACY: AMERICANS' BELIEFS ABOUT HOW GOVERNMENT SHOULD WORK 39 (2002).

41. See Bassok, *supra* note 2, at 306-09, 317, 357-61.

42. For a defense of examining the Court's public image using one media outlet (the New York Times), see Gregory A. Caldeira, *Public Opinion and the U.S. Supreme*

My aim in this Article is not to offer a causal explanation for the decline in public support of the Court. Obviously, the decline of public confidence in any institution involves multiple causes.⁴³ Beyond the difficulty of distilling the effects of the change in the media on public confidence for the Court, my argument is limited since it is based upon examining the change in coverage in only one central media outlet. But even with far more data on the coverage in other media outlets, it would be impossible to demonstrate causation between the shift in coverage and the decline in the public support of the Court. There is not enough polling data on public confidence in the Court in the relevant years to show a consistent correlation between changes in the media coverage and changes in public support for the Court.⁴⁴ Without such data, we can hardly infer accurately how a change in coverage affected public opinion. In addition, people are not inanimate objects that respond in a linear, predictable manner. Hence, crude conceptions of causality are inadequate to explain changes in people's views.⁴⁵ We cannot assume that a change in coverage led necessarily to a corresponding change in public support. In view of these difficulties, rather than offering a causal explanation for the decline of public support for the Court, my Article

Court: FDR's Court-Packing Plan, 81 AM. POL. SCI. REV. 1139, 1143 (1987) (“[T]he coverage in this elite newspaper tracks closely with other sources of information. Furthermore, reports in the New York Times undoubtedly diffuse throughout the nation in a ‘two-step flow’ of information.”).

43. See PATRICIA MOY & MICHAEL PFAU, WITH MALICE TOWARD ALL?: THE MEDIA AND PUBLIC CONFIDENCE IN DEMOCRATIC INSTITUTIONS 41 (2000) (“The melding of substantive and media explanations for the problem of confidence is a form of blended causation . . .”).

44. *Cf. id.* at 53 (“What is required is an interconnected data set: a content analysis of media depictions of institution and opinion surveys to determine whether those people who rely on a given communication source perceive the institution in much the same manner as the source depicted it.”).

45. Michael McCann, *Causal versus Constitutive Explanations (or, On the Difficulty of Being Positive . . .)*, 21 LAW & SOC. INQUIRY 457, 459-61 (1996) (“The problem is that linear, instrumental conceptions of causality are inadequate tools for explaining the dynamic, indeterminate, contingent, interactive processes of judgment, choice, and reasoned intentionality of people in action . . . [Linear] causal analysis tends to be either reductionist or evasive about the ‘causes’ (reasons, goals, motives) that figure into political action.”).

offers a portrayal of the change in the manner the Court was presented to the Israeli public.⁴⁶

Decisionmakers, scholars and publicists frequently base far-reaching conclusions on causal links between various changes in the Court's adjudication and changes in public support for the Court, even though they lack any systematic empirical evidence to support their causal narrative.⁴⁷ These causal narratives have a great effect on the way different players conduct their behavior. This research provides at least a partial empirical basis upon which to evaluate these narratives. As I will demonstrate, at times, changes in the Court's adjudication hardly received any exposure in the media, thus making causal links between these changes and public support for the Court highly tenuous.

In the first part of this project, I explained my method for conducting this research in detail.⁴⁸ Two distinctions are worth repeating. First, the distinction between filmed and non-filmed items; second, the distinction between non-processed results and processed results as it appears in the table below. In non-filmed items, the news-anchor reads the report without any film segments. These items cannot be tracked by a search in Channel One's computerized database. They were detected only by going over the printed news edition line-ups.

Second, there were news editions in which a number of filmed items relating to the same case were broadcast. For example, in the news edition on July 29, 1993, four filmed items were broadcast concerning the Court's judgment on John Ivan Demjanjuk's appeal. One item covered the judgment acquitting Demjanjuk from the charges that he was

46. Cf. SHEILA JASANOFF, *DESIGNS ON NATURE: SCIENCE AND DEMOCRACY IN EUROPE AND THE UNITED STATES* 11 (2005) ("My purpose is . . . to aim for *Verstehen* (understanding) rather than *Erklaurng* (causal explanation).").

47. See Bassok, *supra* note 2, at 358 n. 247 (showing that various scholars "assume" in their theories without any empirical foundation "that a change in the Court's discourse is immediately translated to a change in public discourse."); DANIEL FRIEDMANN, *THE PURSE AND THE SWORD: THE TRIALS OF THE ISRAELI LEGAL REVOLUTION* 78 (2013) (Isr.) (the author, who served as the minister of justice, asserting without any empirical evidence that the decline of public confidence in the Court is a result of the Barak Court's lack of restraint, especially in issues of state's security); see *also id.* at 344-48 (arguing that the decline occurred only after Barak retired while relying on partial data from opinion polls and then asserting that the decline occurred during Barak's presidency).

48. See Bassok, *supra* note 2, at 316-21.

the Treblinka Nazi guard nicknamed Ivan the Terrible (item 14605-93), two more items brought reactions to the judgment (item 14609/10-93) and the fourth item was an interview with a legal expert who explained the decision (item 14608-93). This phenomenon may distort the results. In order to prevent such distortions, items relating to the same case, broadcast on the same news edition, were counted in the processed data as a single item. In the table of results, the processed number of items for each year appears in parenthesis.

I decided to limit the scope of this Article to a four year period stretching from 1993 to 1996, since, based on my research, these years isolate best the impact of the entrance of Channel Two into the arena. The period from 1997 to May 1999 is one of the most turbulent in the Court's history. During this period, the Court decided on a petition that demanded the overturning of the Attorney General's decision not to indict Prime Minister Netanyahu in the Bar-On Hebron affair.⁴⁹ More importantly, in February 1999, in the midst of the 1999 election campaign, a demonstration against the Court of more than 250,000 Israelis, mostly ultra-Orthodox, took place in Jerusalem. At the same time, only 50,000 Israelis demonstrated in support of the Court.⁵⁰ In the May 1999 elections, for the first time in Israeli history, the Court was one of the major issues on which the Israeli public went to vote.⁵¹ Hence, the period between 1993 and 1996, though extremely turbulent, allows us to somewhat isolate the influence of Channel Two's entrance into the arena.

49. HCJ 2534/97 Yahav v. State Attorney 51(3) PD 39 [1997] (Isr.).

50. See Shimon Shetreet, *Resolving the Controversy over the Form and Legitimacy of Constitutional Adjudication in Israel: A Blueprint for Redefining the Role of the Supreme Court and the Knesset*, 77 TUL. L. REV. 659, 661-65 (2003) (describing the events leading to the demonstrations).

51. See, e.g., Etta Bick, *The Shas Phenomenon and Religious Parties in the 1999 Elections*, 7 ISR. AFFAIRS, 55, 69 (2000) ("Regard for the courts and their decisions was another important campaign issue for the secular parties . . . [because of] the ongoing conflict between the Haredi community and the secular community on the question of the authority of the Supreme Court.").

III. THE AMOUNT OF COVERAGE

Table 1: News items broadcast on *Mabat* between 1990 and 1999.

Year	Filmed report/ (processed)	Non- filmed report	Total coverage
1989	12 (10)	17	29
1990	20 (19)	34	54
1991	13 (12)	32	45
1992	19 (16)	27	46
Total (1989-92)	64 (57)	110	174
1993	61 (45)	18	79
1994	82 (76)	10	92
1995	71 (65)	7	78
1996	92 (83)	6	98
Total (1993-96)	306 (269)	41	347
1997	116 (107)	6	122
1998	69 (65)	0	69
1999	122 (108)	2	124

Though the coverage of the Court was on the rise from the beginning of the 1990s (in comparison to the 1980s), in 1993-1994 a major shift occurred. The average coverage in 1993-1996 was 86.75 items per year compared to 43.5 items in 1989-1992, 29.9 items per year in the 1980s, and 10.9 in the 1970s.⁵² While the rather low coverage during the 1980s, averaging one item every other week, sheltered the activist Court from the public eye,⁵³ in 1994 the Court received an average coverage of 1.77 items per week and was much more exposed to the public eye. This increase in coverage contrasts with the decline in television coverage of the U.S. Supreme Court during the same period.⁵⁴ During the 1990s,

52. See Bassok, *supra* note 2, at 321, 323.

53. See Bassok, *supra* note 2, at 330-33 (“It is doubtful whether such a small number was enough to tarnish the Court’s mythical image, trivialize its professional knowledge, and present it as an active player in the political arena.”).

54. See ELIOT E. SLOTNICK & JENNIFER A. SEGAL, TELEVISION NEWS AND THE SUPREME COURT, ALL THE NEWS THAT’S FIT TO AIR? 159, 165-70 (1998) (examining the

American network news editions experienced a decline in audience share that led them to appeal to general audiences by airing more entertainment. The coverage of the American Supreme Court was just another victim of the general shrinkage in the coverage of politics and government in the news.⁵⁵ While infotainment in the U.S. meant “[c]ute animal stories displaced stories on tax policy and Supreme Court decisions,”⁵⁶ in Israel, after the changes in communication patterns, there followed a rise in coverage of the Court. This rise in coverage is undoubtedly related to the Court’s deep involvement, since the mid-1980s, in the central political controversies of Israeli society, an involvement without parallel in the American Court.⁵⁷ The Court’s deep involvement in almost every political controversy made its judgments attractive for coverage, not only according to the older media criterion of importance but also according to the new criterion of public interest.⁵⁸

“decline in already spartan Court coverage brought about, in part, by changes in the broadcast news industry.”).

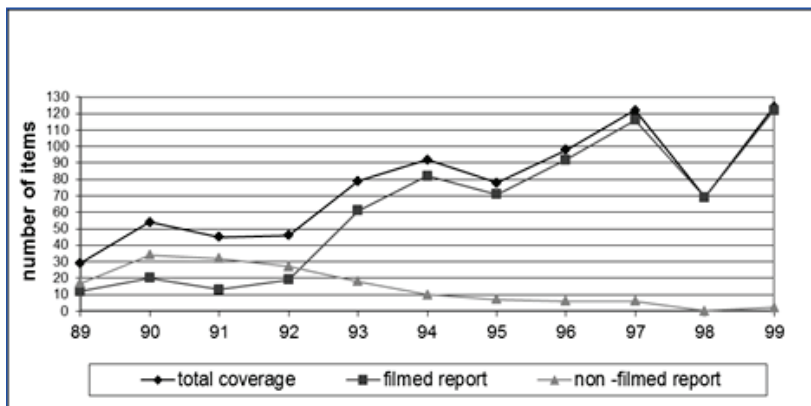
55. See RICHARD DAVIS, *JUSTICES AND JOURNALISTS: THE U.S. SUPREME COURT AND THE MEDIA* 156-58 (2011).

56. Joshua Meyrowitz, *The Power of Television News*, 7(6) *THE WORLD & I* 453, 466 (1992).

57. See SLOTNICK & SEGAL, *supra* note 54, at 228-29 (“coverage of [the American] Supreme Court decisions will always represent, except for the truly rare ‘landmark’ rulings, a residual of scarce broadcast time left over from the day’s more pressing and more television-friendly events.”); Frederick Schauer, *The Supreme Court, 2005 Term - Foreword: The Court’s Agenda - and the Nation’s*, 120 *HARV. L. REV.* 4, 32 (2006) (“When we remove our blinders and survey what the Supreme Court did not do as well as what it did, we see clearly just how few of the public’s major issues of concern or the nation’s first-order policy decisions come anywhere near the purview of the judiciary.”).

58. See PERI, *supra* note 8, at 231 (“in the infotainment era the media deals with the ‘interesting’ and not with the ‘important.’”).

Figure 1: Number of Items on News Editions from 1989 to 1999



In addition to the rise in coverage, the change in media also affected the mix of filmed and non-filmed items. While during the period between 1980 and 1992 only 42.1% of the total coverage were filmed items, between 1993 and 1996, 88.1% of the items were filmed items. This shift corresponds well with television's bias to visuals. As a primarily visual medium, footage is a pre-condition for the coverage of any topic.

Part of the explanation for the big leap in coverage in 1993 is in the lengthening of *Mabat*. Channel One, in view of the upcoming competition from Channel Two, gradually began changing its news edition several months before the official inception of its competitor.⁵⁹ In October 1993, a month before Channel Two's official inception, Channel One lengthened its main news edition from half an hour to a full hour in an attempt to ensure high ratings for a longer duration each evening, since the heads of the Channel believed that Israelis would continue to be loyal to the Channel's flag program.⁶⁰ There is no doubt that this change, coupled with the shortening of items, allowed broadcasting more items per news edition and thus is responsible in part for the rise in coverage.

59. Channel Two broadcast since 1986 on what was titled "experimental mode." However, it was not allowed to produce its own news edition until its official inception in 1993.

60. See Irit Rosenblum, *One Year Later, One Hour Earlier*, HAARETZ, Mar. 31, 1994 (Isr.); Irit Rosenblum, *Will Try to Reproduce the 'Kastner' Success*, HAARETZ, Feb. 9, 1995 (Isr.).

But even before this change, there was a significant rise in coverage. From the beginning of 1993 and up until the end of September of that year, 53 filmed items and 14 non-filmed items were broadcast. Hence, the rise in coverage cannot be attributed only to the lengthening of the news edition but is related to a deeper change in the character of Channel One's news edition as a result of its preparation for the entrance of Channel Two. Moreover, though two years later the news edition was shortened to forty-five minutes, the rise in coverage of the Court continued in the years afterwards (with the exception of 1998).

According to some scholars, visibility is inherently dangerous to institutions such as courts whose legitimacy is based on expertise.⁶¹ First, visibility has the potential to expose the inner politics of a court, thus presenting it not as an empire of law, but as an empire of men.⁶² Second, the logic of television as a medium dictates trivializing and simplifying the legal language. Hence, an increase in visibility may expose the Court's claim to expertise in deciding political controversies as a sham. Concealment is thus best for maintaining public belief in the Court's expert knowledge.⁶³ However, in my previous Article, I showed that although the rise in coverage had the potential to erode the Court's image as an expert, it did not, since the media continued to present the Court through a mythical prism. Even when television covered the Court more frequently, as it deepened its intervention in the political realm, it was still portrayed as an apolitical body, intervening in the political arena in the name of legal expertise.⁶⁴ However, as will be elaborated below, the shift in the prism through which the Court is covered gave an entirely different meaning to the steep rise in coverage starting in 1993.

61. See JOSHUA MEYROWITZ, *NO SENSE OF PLACE: THE IMPACT OF ELECTRONIC MEDIA ON SOCIAL BEHAVIOR* 63-66 (1985).

62. See Christopher D. Johnston & Brandon L. Bartels, *Sensationalism and Sobriety, Differential Media Exposure and Attitudes toward American Courts*, 74(2) *PUB. OP. Q.* 260, 262 (2010) ("Given the strong distaste citizens have for the conflicts and compromises intrinsic to the political process . . . the ability of the courts to shield their inner political workings, or 'backstage' areas, from the public is an important factor in maintaining public support.").

63. See *id.* at 261-62.

64. See Bassok, *supra* note 2, at 330-33.

IV. "OUTSIDE THE COURT"

The shift in coverage of the Court is most vivid in the category I dub "outside the Court." In the items included in this category, the Court is covered in a capacity other than its decision-making capacity, i.e., not in its routine, daily work. This category includes items on the appointment and retirement of judges, items on the public appearances of judges, reflective items on the Court as an institution, etc. The "outside the Court" category is the only one in which the coverage is focused on judges as individuals and on the Court as an institution. These items expose best the controlling prism, the "glasses," through which the media views the Court as an institution. In coverage of concrete Court decisions, this controlling prism is harder to detect since the substantive issue at play colors the media's framing of the Court. But this "outside the Court" category offers a very effective barometer for the media's view of the Court, without any substantive issue tainting the picture.

The Judges' Election Committee, which appoints all judges in Israel, is made up of three judges of the Supreme Court, two representatives of the Israeli Bar Association, two government ministers (one of whom is the Minister of Justice), and two members of the Knesset (the Israeli parliament).⁶⁵ Though judges constitute a minority of the Committee, in practice, at least in the period examined in this Article and with regard to the Supreme Court judges, the Committee was dominated by the three Supreme Court judges and no judge was selected to the Court without the incumbent judges' consent.⁶⁶ During the period covered by this study, five judges were appointed to the Court.⁶⁷

Until 1993, the only item covering the selection committee was broadcast in 1982 and focused on a controversy in the Knesset as to whether one of its members should remain a committee member, as one

65. Basic Laws: The Judiciary, Art., 4.

66. See Michael Mandel, *Democracy and the New Constitutionalism in Israel*, 33 *ISR. L. REV.* 259, 281-82 (1999) (arguing that in view of the dominance of Supreme Court judges in the appointment process, "[t]here appears to be no constitutional court so self-perpetuating in the world"); MAUTNER, *supra* note 17, at 164-65; Hirschl, *supra* note 11, at 487.

67. See Eli M Salzberger, *Temporary Appointments and Judicial Independence: Theoretical Analysis and Empirical Findings from the Supreme Court of Israel*, 19 *MEHKAREI MISHPAT* 541, 563 (2003) (Isr.).

of two Knesset representatives, in light of his appointment as a deputy-minister.⁶⁸ Thus, even when covering the appointment of judges, when the Court is unable to divert attention from the people who produce the judgments to the judgments themselves,⁶⁹ television continued to cover the Court through a mythical lens. The appointments of new judges were covered exclusively during the inaugural phase, thus producing festive items full of praise for the nominee and the Court, presenting the nominee as a consensual figure and emphasizing his judicial qualifications.⁷⁰ Television framed the inauguration ceremony as a “rite of transformation” in which a nominee entered under the veil of the mythical image, becoming a mere instrument of the rule of law.⁷¹ By not giving visibility to issues such as controversies regarding certain candidates, which were well known among the legal community,⁷² television avoided concentrating on the personalities of the nominees, thus supporting the image of the Court as an empire of law, not of men. As opposed to the coverage of political institutions which is focused on the relationships between politicians, their personalities, and their motives, the avoidance of dealing with the candidate’s character presented the Court as a forum that decides solely on the merits of the case without any political or personal tendencies stemming from the personalities and backgrounds of the judges presiding. Thus, it is no wonder that the coverage of the judicial nomination process contributed to the Court’s mythical image.⁷³

68. See Bassok, *supra* note 2, at 343.

69. Cf. RICHARD DAVIS, DECISIONS AND IMAGES: THE SUPREME COURT AND THE PRESS 134-36 (1994) (“The [American Supreme] Court has long sought to direct press coverage to its cases . . . the Court has been stunningly successful at focusing press attention on its product and deflecting attention away from the individuals who produce it.”).

70. See Bassok, *supra* note 2, at 339-42.

71. See Paul W. Kahn, *Marbury in the Modern Era: Comparative Constitutionalism in a New Key*, 101 MICH. L. REV. 2677, 2687 (2003) (“Confirmation is literally a ritual of transformation - a rite of passage . . . Nothing is allowed to survive that breaks from one world into the other.”).

72. See, e.g., NOMI LEVITSKY, THE SUPREMES: INSIDE THE SUPREME COURT 197-98 (2006) (Isr.) (discussing the controversy over the appointment of Judge Cheshin to the Court).

73. See Gad Barzilai, *Between the Rule of Law and the Laws of the Ruler: Israeli Legal Culture and the Supreme Court*, 152 INT’L SOC. SCI. J. 193, 199 (1997) (“The

In 1993, the situation changed with the broadcast of an item covering the Judicial Selection Committee's inability to agree for the second time on the appointment of judges to the Court (item 20030-93, from 10.17.93). The reporter noted that Dorit Beinisch, then the state attorney, was the main candidate under consideration. The rise of "television logic" required personalizing issues.⁷⁴ Thus, the coverage of appointments changed and the nominee was put at the center. Moreover, for the first time, the committee's failure to agree on an appointment was presented to the public. Thus, rather than presenting the candidate at the inauguration phase, entering under the mythical veil in a celebratory ceremony, the candidate is presented as "all too human" in her failure to receive the committee's approval.⁷⁵

Less than a month later, *Mabat* broadcast an item covering a petition to the HCJ challenging the secrecy of the committee's discussions and its refusal to publish the names of the potential nominees to the Court.⁷⁶ The reporter noted the peculiarity of the situation in which the judges presiding needed to decide on the working procedure of a committee in which their colleagues preside (item 22222-93, from 11.14.93). While the petition was dismissed, it began a process that ended with changes to the committee's working procedure. Beginning in 1997, the names of the candidates to courts have been published at least twenty-one days before the committee adjourns.⁷⁷

The appointment of Vice President Barak to the position of the Court's president received unprecedented coverage for a judicial appointment. During that period, according to convention, the position of president of the Court was awarded strictly on the basis of seniority, thus making the process of "choosing" a president a mere formality. Yet, the selection committee's meeting, in which Barak was "chosen" for that

judicial nominations process contributed to the myth that judges were not political actors.").

74. See PERI, *supra* note 8, at 97 ("Television does not like to deal with issues as abstract topics and prefers to personalize them.").

75. However, television did not report that the Court's President at the time, Meir Shamgar, objected to Beinisch's nomination. See Tova Zimoki & Amir Shoan, *The Beinisch Test*, YEDIOTH AHARONOT – 7 Days, Aug. 25, 2006, § 19, at 26 (Isr.); LEVITSKY, *supra* note 72, at 78-79.

76. HCJ 5571/93 Zitrin v. Minister of Justice 48(1) PD 661 [1993] (Isr.).

77. See AMNON RUBINSTEIN & BARAK MEDINA, *THE CONSTITUTIONAL LAW OF THE STATE OF ISRAEL* 133, n.28 (6th ed. 2005) (Isr.).

position, was the opening item of the news edition (item 18937-95, from 7.19.95). On its face, the item does not deviate from the mythical model: the reporter described Barak's rich career and the Justice Minister David Libai (*Labor*) congratulated President Barak in a short interview, stating that with this appointment he can "congratulate all the people of Israel." Yet, as the reporter stressed, this was the first time the committee's gathering was shown to the public from inside the conference room—just nine people sitting in a room behind a table. Destroying the mythical image of a court does not require public attacks against it. To unveil a myth, it is enough to expose the institution in its most intimate moment.⁷⁸ For the Court these intimate moments occur during the appointment process and especially in the selection committee's discussions. Instead of showing a judge nominated to the role of the president of the Court by the President of Israel in a ceremony full of majesty as done in the past,⁷⁹ television presented a committee of people, some of whom were politicians, sitting in a room and crowning one of them as president of the Court. Moreover, the reporter notes that Barak is nicknamed "the state's director general" and "the king of activism." This focus on Barak as an individual judge with his own agenda, rather than as merely part of an institution committed to the rule of law, further eroded the mythical image.⁸⁰

President Barak's inaugural ceremony also received extensive and unprecedented coverage. A portion of his inauguration speech was broadcast in a special section in the news edition covering the ceremony. President Barak, as the reporter noted, addressed the concerns of many regarding his tendency to intervene in the work of the other branches. He stressed that he is "not a politician" and "does not strive for power, does not aspire to govern." (item 20764-95 from 8.13.95). The commentary by

78. Cf. Thomas Nagel, *Concealment and Exposure*, 27 PHIL. & PUB. AFF. 1, 18 (1998) ("Why should the direct gaze of others be so damaging, even if what is seen is something already known, and not objectionable? If newspapers all over the country published nude photographs of a political candidate, it would be difficult for him to continue with the campaign even if no one could charge him with any fault.").

79. See Bassok, *supra* note 2, at 341-42.

80. See Stephen Breyer, *Communication Media and Its Relationship with Supreme Courts*, 42 ST. LOUIS U. L. J. 1083, 1086 (1998) ("The more the media writes about an individual judge, the greater the probability the judge will become a known 'personality,' lessening (in my opinion), the power of the law.").

Moshe Negbi, the legal commentator of Channel One, following the item corresponded to the patterns of the mythical image. For example, though his portrayal of Barak may easily fit that of a politician (“the prophet and flag-bearer of the constitutional revolution”; long-term goals which justify “lowering his profile” and “not to emphasize the true goals of the constitutional revolution” during the beginning of his term as president; the Court’s president as setting aims for the Court) rather than a judge (judging on a case-by-case basis rather than promoting a certain agenda; the Court’s president as first among equals, “merely” one vote on the Court), the commentary had a totally different tone. And indeed, the anchorman reacted to Negbi’s description of Barak’s agenda favorably, saying: “[H]e wants us to be like the advanced western states” (item 20765-95 from 8.13.95).

A few weeks earlier, in a commentary on the Friday edition of *Mabat* (*Yoman*) after an interview with the retiring President Meir Shamgar, Negbi noted that contrary to Prime Minister Rabin’s relationship with Shamgar, which is based on “mutual respect from their service in the IDF [the Israeli military], the history of the relationship between Rabin and Professor Barak is a story of severe clashes that led to mutual hostility and lack of confidence.” Yet, after a presentation of the roots of their hostility, Negbi summarized, that as opposed to Rabin’s claim in his book that Barak “seeks an image of a brave person while in practice he follows public opinion,” Barak is guided not by “populism” and “a desire for power” but “by a commitment to the rule of law” (item 19639-95, from 7.28.95). This commentary, iterated while background music played and pictures with funky graphics appeared, distills the clash between the infotainment of the commercial media and the mythical image of the Court. The former encourages the presentation of the relationship between the Court and the prime minister as a clash full of drama between two personalities and based on low politics, while the latter dictates presenting President Barak as guided solely by the rule of law. Needless to say, never before had television broadcast an item focused on the relationship between the president of the Court and the prime minister.

Until Barak’s presidency, the Court had never been presented as being dominated by one persona. This was an essential part of its mythical image, the image of the rule of law and not the rule of particular men and

women.⁸¹ Presenting the Court's judgments as dependent upon the subjectivity of a particular judge erodes "the distinction between the rule of law and the rule of men."⁸² Now, as a result of the commercial media's tendency to personalize the news, the Court was presented as Barak's Court. Ironically, Barak wrote in 1987:

The American Supreme Court is perceived as a 'political' court . . . the Israeli Supreme Court is not a 'political' body, and it is not perceived as such by the public There is no distinction between the court of one president ('Olshan's Court') and the court of another president ('Agranat's Court'). We should continue this tradition. A transatlantic inspiration in this field is not desirable.⁸³

In 1995, President Barak's wife, Elisheva, was appointed to the National Labor Court. The coverage of her inaugural ceremony gave visibility to claims of nepotism in the selection process. The reporter noted that, within the selection committee, there was a "struggle between the fear of the appearance of family favoritism and discrimination against a talented judge." In a short interview, Minister of Justice Libai declared that the selection was solely based on Elisheva Barak's merits. "However," he added that to avoid claims of "discrimination or preference," the situation of appointment of two spouses as judges should be avoided in the future (item 22052-95 from 8.29.95).

The accusations of low or personal politics in the appointment process would resurface in 1997 when the chairman of the Israeli Bar Dror Hoter-Ishay explained that he objected to the appointment of Professor Yitzhak Engelard to the Court because he lacked experience as a lawyer and since "it is not proper to nominate your friends to the Court." The reporter added that this insinuation regarding the friendship between Barak and Engelrad did not prevent the majority of committee members from voting for the nomination, against the minority opinion of the two Bar representatives (item 9744-97 from 5.4.97; item 12727-97 from

81. See PAUL W. KAHN, *THE CULTURAL STUDY OF LAW* 79-80 (1999) ("The rule of law must, therefore, work to suppress the appearance of the justice as a unique subject . . .").

82. See PAUL W. KAHN, *THE REIGN OF LAW* 22, 164 (1997).

83. Aharon Barak, *The American Constitution and Israeli Law*, 26 *ZMANIM* 13, 26 (1987) (Isr.).

7.13.97). The coverage in these items gave visibility to suggestions that personal politics rather than apolitical expertise or even political convictions (high politics) are behind the appointments. The coverage jumped directly from the mythical frame, which presented appointments as determined based solely on apolitical expertise, to the low politics. Not politics in terms of certain policy goals or even partisan ideology, but politics in its lowest form: power politics and nepotism. In the past, there was a clear distinction in television coverage between appointments to the judicial branch and appointments to the political branches. The former were presented as based on the candidate's competence in the field of law; the latter were presented, at least partly, as the result of low politics and logrolling.⁸⁴ Now the distinction was no longer clear. Commercial media's preference to frame appointments as driven by low politics is part of its tendency to personalize events and simplify news.⁸⁵ This tendency created a new framing for covering the appointment phase. Lessons from the U.S. teach us that this kind of personal framing ("nine *old men*"), rather than criticism of the institution in more abstract terms on an ideological level, is the most lethal to courts' sociological legitimacy.⁸⁶ Thus, while the coverage in Israel did not mention the political or ideological views of the candidates, as is customary in coverage of Supreme Court appointments in the U.S.,⁸⁷ the low-politics angle may have been much more lethal in eroding the Court's mythical image.

84. See Ronen Shamir, *The Politics of Reasonableness, in ISRAEL: FROM MOBILIZED TO CIVIL SOCIETY?* 281 (Yoav Peled & Adi Ophir eds, 2001) (Isr.).

85. See PERI, *supra* note 8, at 113 ("[T]elevision has led to personalization of events and personification of news . . . 'The messenger becomes the message.'").

86. See, e.g., Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2635 (2003) ("[H]ow one says things matter . . . Conservatives figured out that it was easier to attack individual judges than the institution of judicial review, and that successful attacks depended on spinning stories the right way. Progressives spend their time railing at the Court, and doing so in a fairly technical way unlikely to capture public attention.").

87. See CHRISTOPHER L. EISGRUBER, *THE NEXT JUSTICE* 6 (2007) (noting that in popular debates of Supreme Court nominations the nominee is frequently depicted as an ideologue who would decide cases on the basis of a political agenda); Harvie Wilkinson III, *Madison Lecture Toward One America: A Vision in Law*, 83 N.Y.U. L. REV. 323, 332 (2008) ("The media identify judges as Republican or Democrat; the confirmation process sends nominees through bruising partisan disputes in which underlying merit is obscured . . .").

Menachem Mautner recently suggested that the decline in public confidence for the Court is the result “more than anything else” of the public exposure of low politics in the appointments to the ranks of the Court.⁸⁸ Mautner detects several affairs, all reported after 2005, in which judicial appointments were portrayed in the media as tainted by nepotism and other considerations of low politics. Mautner also describes reports in the media, during the same period, of corruption in the selection of clerks to the Court. According to Mautner, in view of the Court’s activist intervention in political life, with the declared goal to fight corrupt government appointments, its failure to live up to its own high standards, was extremely disturbing for the public.⁸⁹ As demonstrated above, the exposure of claims that low politics controls the Court’s hidden regions occurred earlier than Mautner detected.

Not only was the coverage of the appointment process now different, the coverage of retirement of judges had also changed. In 1993, three judges retired. Two of them, Judges Elon and Maltz, offered criticism of the Court’s activism in an interview they gave on their retirement day. Judge Elon stated that he was “worried concerning the image of the Court” in the face of its growing activism. The reporter interviewing Elon asked him a question unthinkable in television coverage during the 1980s. Elon was asked to respond to the claim that, when it came to the selection of judges to the Court, the “clique” of judges did not follow the standards of impartiality they demand in their judgments from other public officials. Judge Elon answered that the judges appointed should first fit the high post; second, he stated that there should be pluralism so that the judges will have diverse ideologies (item 23257-93 from 11.24.93). Judge Maltz said that the Court should stay away from the political arena and should intervene less in the Knesset’s work. He also told the reporter that his view was now a minority view on the Court (item 18710-93, from 9.28.93). This kind of critique did not exist in television items covering judges’ retirement before 1993.⁹⁰

88. MAUTNER, *supra* note 17, at 165.

89. See MAUTNER, *supra* note 17, at 160-69 (arguing that the Court’s involvement in “the appointment process in the past three decades . . . more than anything else, has contributed to the exposure of the political normative system underlying the Court’s conduct and to the deterioration of the Court’s status and legitimacy.”).

90. See Bassok, *supra* note 2, at 340 (“[T]he coverage of the death or retirement of judges was full of praises for the individual judge and for the Court as a whole.”).

Yet not all items that covered the appointment and the retirement of judges after Channel Two entered the arena diverged from the mythical model. Judge Beinisch's inauguration ceremony was covered in the same fashion in which appointments and retirements of judges were covered during the 1980s (item 2988-96 from 12.25.95). This item presented a festive and consensual atmosphere in line with the mythical image of the Court.

Until 1994, criticism of the Court was covered almost always as part of reactions to the Court's judgments. Between 1994 and 1996, sixteen items were dedicated to unprecedented criticism of the Court that was unrelated to any specific judgment. This criticism came mainly from religious parties and from the Chairman of the Bar. Before 1993, the Court received extensive coverage when it affected the political arena via its judgments.⁹¹ Now, as the Court became the focus of the political arena independently of specific judgments, television coverage soon followed.

During the period examined, television covered harsh statements against the Court by the spiritual leader of the Sephardic religious party *Shas*, Rabbi Ovadia Yosef (item 23771-96, from 10.9.96) and articles in newspapers affiliated to ultra-orthodox Jews against the Court, as well as threats to harm President Barak (item 20945-96, from 8.27.96; item 21221-96, from 8.26.96). Law professors, politicians from both the right and the left and former judges condemned these threats and attacks against the Court. Their reactions were covered extensively (items 20947-96 from 8.27.96; 22107-96 from 9.8.96; 21565-96 from 9.3.96). The Minister of Justice Tzachi Hanegbi (*Likud*) issued strong statements condemning the "attacks on the Court." Prime Minister Benjamin Netanyahu was more ambivalent. Though he condemned the threats on judges and stressed the important role of an independent Court as a pillar of Israeli democracy, he stated that he was examining the Court's authorities (item 22107-96, from 9.8.96).

Grievances about the Court's bias against religious Jews, especially the ultra-Orthodox, were for the first time widely covered by television. This coverage not only expressed their attitude toward the Court,⁹² but

91. See Bassok, *supra* note 2, at 323 ("[W]henver the Court appeared as a major player in the political arena—affecting a highly controversial political dispute—it was covered extensively.").

92. See GAVISON, KREMNITZER & DOTAN, *supra* note 5, at 106 (discussing the ultra-Orthodox's alienation from the Supreme Court).

also started to erode its neutral image in coverage. Knesset members, deputy-ministers and ministers, both from ultra-orthodox parties and from the religious-Zionist party (*Mafdal*), condemned any threats of violence but added sharp criticism of Barak's judicial activism. Knesset Member (MK), Arye Gamlieal (*Shas*) stated that Barak is "overstepping the boundaries of the law, taking to himself more powers than the laws allows, interpreting the law according to his liberal, universal views. He causes all the problems." (item 20945-96, from 8.27.96). MK Igal Bibi (the National Religious Party, *Mafdal*) declared that Barak is "causing the destruction of democracy in Israel." (item 20945-96, from 8.27.96). Thus, various speakers suggested changing the system of selecting judges and restricting the Court's authorities so that it would not "take over" the Knesset's authorities. Visibility in coverage was given to the contention that the judges decide ideological issues according to their personal views, disregarding legal reasoning, as well as to the claim that Judge Barak is an "agent" of a leftist party (*Meretz*).

In the past, even when criticized, the Court was not depicted as partisan or as exceeding the law based on the judges' personal views. Moreover, there were occasions in which the Court intervened in highly contentious political controversies – such as the legality of a settlement – that almost demanded a political framing (which the judges expected). And yet the mythical prism continued to control the Court's framing;⁹³ but now it was framed as affiliated to one political camp in Israeli society. Identifying the Court with partisan politics, rather than merely claiming that it is political, in the sense of making ideological decisions, is lethal for the judicial institution's image as neutral.⁹⁴ Thus, the perception of the Court as an objective, politically neutral and principled decisionmaker, a perception that is crucial for its enduring public

93. See Bassok, *supra* note 2, at 345-48, 350, 354-55 ("Reporters continued to contrast between the Court's legal neutral domain and the political arena Indeed, the reports still adhered to the notion that although the Court was dealing with political issues, its discretion was guided by legal considerations and not by political ones.")

94. See Michael J. Klarman, *Bush v. Gore Through the Lens of Constitutional History*, 89 CALIF. L. REV. 1721, 1725 (2001) ("It is one thing to say that a judge's political ideology influences her constitutional interpretations. It is quite another to say that her partisan political preferences do.")

support, was undermined.⁹⁵ Robert Dahl once wrote, in the context of the American Supreme Court, that “much of the legitimacy of the court’s decisions rests upon the fiction that it is not a political institution but exclusively a legal one”⁹⁶ For an Israeli watching Channel One’s news edition, the ability to distinguish the process of decision making in the Court from the process in the political arena started to disappear.

Though the coverage tended to portray the situation as “attacks” solely by the religious public on the Court (see for example, item 24680-96, from 10.22.96), visibility was also given to harsh criticism of the Court made by the chairman of the Israeli Bar, Dror Hoter-Ishay. Many, including the Minister of Justice, condemned Hoter-Ishay’s statements, which were first published in an interview by an ultra-Orthodox newspaper (item 1244-97, from 11.27.96; 1335-97, from 11.28.96). Though Hoter-Ishay’s criticism was presented as unrepresentative of the general view among the majority of lawyers (item 1335-97, from 11.28.96⁹⁷), criticism of the Court as an institution was no longer restricted in television coverage to the religious sections of society.

When the selection committee assembled just after Hoter-Ishay’s interview, his criticism penetrated the coverage of this body that was once beyond reproach. The reporter noted that Hoter-Ishay, a member of the committee, did not apologize for his statements. The justice minister and MK Rubinstein, both members of the committee, criticized Hoter-Ishay harshly, but another member of the committee, MK Rivlin said: “After all, we learned from the Supreme Court that there are no sacred cows in Israel and that everything is justiciable. The Court is also justiciable.” (item 1396-97, from 12.1.96).

President Barak was quoted in one of the items as giving advice to his fellow judges not to play into the hands of their critics by being dragged into political and social controversies (item 20945-96, from 8.27.96). But the Court was no longer presented as an apolitical player standing above

95. Cf. Tom R. Tyler & Gregory Mitchell, *Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights*, 43 DUKE L.J. 703, 708-14 (1994) (arguing with regards to the American Supreme Court that “perceptions of political neutrality bear an important relationship to Court legitimacy.”).

96. Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 280 (1957).

97. In this item, covering the induction ceremony to the bar, the reporter states that Hoter-Ishay’s criticism caused strain and embarrassment to the audience.

and outside of the political arena. The attacks on President Barak with no connection to a specific judgment symbolized the shift in the Court's image: President Barak was attacked as the head of a political institution, similarly to the fashion of attacking the prime minister for every failure of his government.

In 1996, before the election of the first Netanyahu government, Justice Minister David Libai (*Labor*) publicly criticized courts in view of a lenient verdict given by a district court in a famous rape case.⁹⁸ Libai noted that, if contrary to his hopes, the "appeals court" cannot "straighten out" judges and create the proper level of sentencing, there would be no choice for the legislator but to create mandatory minimum sentences in rape crimes to constrain judicial discretion. In response, President Barak sent to the minister a letter. Television thus got an excellent chance to cover the Court according to its new and preferred personal frame. After a short presentation by the anchor, the reporter began his report noting that

Judge Aharon Barak has created many precedents for the legal system, and on this occasion he also created two precedents: first, a piercing criticism of the justice minister; second, Judge Barak made his letter public [waving a copy of the letter] so as to make the public aware of his concern for the judicial system and in order to demonstrate leadership. (item 3786-96, from 1.3.96).⁹⁹

After providing more details on Barak's letter, the reporter explained the lack of response from the minister by noting, "Minister Libai asked

98. Since Libai did not discuss explicitly the Supreme Court, the item covering his criticism was not detected by my search and thus was not counted in my results. Barak's response was of course detected.

99. Barak's letter was not "unprecedented." In January 1952, in a discussion at the Knesset, the Justice Minister at that period, Dov Yosef, criticized judges on their lenient verdicts against those convicted in violence against policemen. The President of the Supreme Court at that time, Moshe Zmora, wrote a letter to the speaker of the Knesset protesting against the minister's criticism. In a response, Prime Minister Ben-Gurion and Yosef criticized Zmora on his intervention in Knesset's discussions. ELYAKIM RUBINSTEIN, *JUDGES OF THE LAND: THE ORIGIN AND CHARACTER OF THE ISRAEL SUPREME COURT* 97-100 (1980) (Isr.) (noting that since Zmora's letter there was no other incident in which judges made public their critique towards politicians who criticized the Court).

tonight not to escalate the verbal confrontation and the wrangle with Judge Aharon Barak.”

During the period between 1993 and 1996, public figures began to criticize the Court in statements that were focused on issues not directly related to it. The Court became just another player in the mix of political debate. For example, in 1994 Prime Minister Rabin made a speech after the IDF failed in its rescue operation of Nachshon Wachsman, an Israeli soldier who was kidnapped by Hamas terrorists. Rabin, who was hardly an admirer of the Court's activist tendencies, said: “it is inconceivable that a member of Hamas, who was an accomplice to a murder, can submit a petition to the HCJ on not getting the proper amount of sleep and will receive a judgment because this is the law, [in an ironic tone of voice:] I do not have a complaint toward the HCJ, I want the authority to administratively arrest all Hamas leaders without legal babble complexities . . .” (item 24276-94, from 10.19.1994). The Court became a fully-fledged player in the political arena and as such it was criticized by politicians in items that had no connection to the coverage of a specific judgment or to another development (such as judicial nominations) in which the Court was the focal point. A day after the prime minister's critique, one of the most devoted defenders of the Court, MK Dan Meridor (*Likud*), reacted to Rabin's criticism of the Court offering the sound bite “we need to fight Hamas, not Bagaz [the HCJ in Hebrew].” (item 24372-94 from 10.20.1994).

V. THE CONSTITUTIONAL REVOLUTION

In 1992, the Knesset enacted Basic Law: Freedom of Occupation, and Basic Law: Human Dignity and Liberty, which established a partial bill of rights. These two Basic Laws were added to nine already in existence, which anchored the institutional structure of the state. Before 1992, according to the Court's adjudication, the status of all the Basic Laws was similar to ordinary laws. Two major differences did exist. First, according to a decision of the Knesset from 1950, when the piecemeal legislation of the Basic Laws was completed, they would form Israel's Constitution. Second, in 1969 the Supreme Court invoked the authority to review and invalidate laws that violated the few entrenched provisions

anchored in the Basic Laws.¹⁰⁰ In the realm of human rights, the Court was limited in the pre-1992 era to judicial review of administrative acts, based on the “implied bill of rights” doctrine it created.¹⁰¹

The enactment of the two 1992 Basic Laws received scarce media coverage and was hardly at the center of the public discourse, either before or after the enactment.¹⁰² In 1995 the Supreme Court, led by its new President Aharon Barak, essentially adopted the “constitutional revolution” thesis in the *Bank Hamizrachi* case.¹⁰³ He offered this thesis in an academic lecture a few years earlier.¹⁰⁴ According to this thesis, the two new Basic Laws confer on the Court the power to invalidate laws inconsistent with the 1992 Basic Laws without any link to the question of entrenchment. The Court also began establishing the understanding that the 1992 legislation created normative gradation so that all previous Basic Laws should be seen as higher laws, i.e., as Israel’s Constitution.¹⁰⁵

The Court acted in a highly activist fashion in adopting the “constitutional revolution” thesis. Moshe Landau, a former president of the Court, went so far as to claim that Barak had led the Court to “granting Israel a constitution through [the] Court’s decisions.”¹⁰⁶ Yet at least television coverage did not grant any extended coverage to this Court-led “revolution.” Only six filmed items, which are 1.9% of the

100. See Gavison, *supra* note 11, at 366-71 (describing Israel’s constitutional history).

101. See Hirschl, *supra* note 11, at 478.

102. See Gideon Sapir, *Constitutional Revolutions: Israel as a Case-study*, 5 INT’L J.L. IN CONTEXT 355, 364-65, 370-71 (2009) (“No evidence, however, supports the claim stating that the significance of the constitutional revolution was presented to, discussed and broadly supported by the public prior to the Knesset vote on the adoption of the new Basic Laws. The issue received minimal media coverage at the time, both before and after the enactment of the Basic Laws.”).

103. CA 6821/93 Bank HaMizrachi United Ltd. v. Migdal Communal Village 49(4) PD 221 [1995] (Isr.), *translated at* http://elyon1.court.gov.il/files_eng/93/210/068/z01/93068210.z01.htm (last visited Sept. 11, 2014).

104. See Aharon Barak, *A Constitutional Revolution: Israel’s Basic Laws*, 4 CONST. F. 83 (1992-1993) (presenting the “constitutional revolution” thesis).

105. See Gavison, *supra* note 11, at 371-72; Rivka Weill, *Hybrid Constitutionalism: The Israeli Case for Judicial Review and Why We Should Care*, 30 BERKLEY J. INT’L L. 349, 350 (2012).

106. Moshe Landau, *Granting Israel a Constitution Through Court Decisions*, 3 MISHPAT U-MIMSHAL 697 (1996) (Isr.).

filmed items covering the Court during the period between 1993 and 1996, focused on the development of the “constitutional revolution.” The subsequent influence of the “constitutional revolution” was also covered in several other items. The item that covered the hearing in the *Ganimat* case¹⁰⁷ (item 13629-95, from 5.14.95) and the items that covered the *Mitrael* affair¹⁰⁸ can be added to the “constitutional revolution” category (items 1057-97, from 11.25.96; 1156-95, from 12.26.94; 20310-93, from 10.22.93). The former case focused on the effect of Basic Law: Human Dignity and Liberty, on the rights of detainees. The latter affair dealt with the effect of Basic Law: Freedom of Occupation, on the import of non-Kosher meat. Yet I classified the items covering them under the criminal law and the state and religion categories respectively, since the focus of the coverage was not the influence of the constitutional revolution.¹⁰⁹ But even when adding these items to the “constitutional revolution” category, the total number of filmed items in which the constitutional revolution was covered is only 3.2% of the filmed items broadcast in the entire period between 1993 and 1996.

The first item in which the “constitutional revolution” thesis was presented in *Mabat* was broadcast on December 1994 when television covered Barak’s lecture on the 1992 Basic Laws given at the Bar-Ilan University (item 28326-94 from 12.6.94). This was hardly Barak’s first lecture on this topic. Since May 1992, he had given numerous lectures on the two new Basic Laws¹¹⁰ with the declared intent to promote the “constitutional revolution” thesis so as to enhance the public legitimacy of this invisible revolution. Barak even explained that he used the term

107. HCJ 2316/95 *Ganimat v. Israel* 39(4) PD 589 [1995] (Isr.).

108. HCJ 3872/93 *Mitrael v. The Prime Minister* 47(5) PD 485 [1993] (Isr.); HJC 4676/94 *Mitrael v. Israeli Knesset* 50(5) PD 15 [1996] (Isr.).

109. The items covering the Miller case (a petition challenging the Israeli air force policy banning women from becoming combat pilots (classified under “security forces” category)) is also related to the constitutional category since the judgment is saturated with references to Basic Law: Human Dignity and Liberty. HCJ 4541/94 *Miller v. Minister of Defense* 49(4) PD 94 [1995] (Isr.), *translated at* http://elyon1.court.gov.il/files_eng/94/410/045/Z01/94045410.z01.htm. However, no reference is made in the two items covering the affair (items 16557-95 from 6.21.95, 25388-95 from 11.8.95) to the Basic Law.

110. Barak, *supra* note 104.

“revolution” to capture public attention.¹¹¹ The item was the last in the news edition’s lineup and both the anchorman and the reporter presented the constitutional revolution not as a major change in the state’s constitutional structure but mainly as a struggle between the religious parties and the Supreme Court, and especially then Supreme Court Vice-President Aharon Barak. Two Knesset Members from religious parties, Yigal Bibi (*Mafdal*) and Shlomo Benizri (*Shas*), criticized the Supreme Court and in particular Judge Barak. Bibi titled the situation “judicial dictatorship.” MK Benizri stated that “the HCJ’s judgments, Barak’s judgments, contradict the spirit of the Jewish *Halacha* [Jewish Law] . . . These judgments create a new Israeli reality that does not accord with Judaism.” The reporter explained that “Vice-President Barak . . . will be, next summer, the President of the Court...the *Shas* party coexists nervously with the secular courts but Barak has gone too far for them. Today the party decided to create a broad coalition with other religious parties against Barak.” Aside from short excerpts from Barak’s lecture, the constitutional endeavor is presented through the narrow perspective of the struggle between the religious parties and Judge Barak.

Though Judge Barak’s lecture was not a judgment with conflicting sides, commercial television’s dislike for abstract stories and its preference for conflict and drama are very apparent in the framing of his lecture.¹¹² In media terms, a lecture on abstract, invisible concepts is considered boring. The world of commercial media is ruled by the fear of being boring and the need to be amusing at all costs.¹¹³ Thus, it is no wonder that, although the lecture did not focus on religious issues, it was covered from the political angle as a political conflict and even as a personal feud between the religious parties and Barak. For example, MK Benizri speaks of Judge Barak as if he is the Court.

Only two items covered the hearing and judgment in the *Bank Hamizrchai*¹¹⁴ case, the “Israeli *Marbury v. Madison*,”¹¹⁵ in which the

111. Israel Herzberg, Pinchas Merinsky & Yiron Pestinger, “*I Spoke of a Constitutional Revolution to Draw Attention*”, *THE LAWYER*, May 1996, at 11, 18 (interviewing President Barak).

112. *Cf.* SLOTNICK & SEGAL, *supra* note 54, at 110-16, 234-35 (describing the American television’s biases in covering the Supreme Court).

113. *See* PIERRE BOURDIEU, *ON TELEVISION 2-3* (1996).

114. CA 6821/93, *supra* note 103.

115. RAN HIRSCHL, *CONSTITUTIONAL THEOCRACY* 142 (2011).

Court adopted the “constitutional revolution” thesis (items 27469-94 from 11.27.94 and item 25629-95 from 11.9.95).¹¹⁶ Moreover, while four minutes and twenty seconds were dedicated to an item covering the important petition in *Ayoub* (1978)¹¹⁷ during the 1970s (item 10243-78 from 11.23.78), only two and a half minutes were dedicated to the *Bank Hamizrchai* case’s more than three-hundred pages long judgment (item 25629-95 from 11.9.95). The situation became even more dire in 1997, when the Court, for the first time, declared that, in the *Bureau for Investment Advisors*,¹¹⁸ a provision in a law was unconstitutional since it violated Basic Law: Freedom of Occupation. Channel One dedicated a total of only thirty seconds to this important precedent (item 16869-97 from 9.24.97).¹¹⁹ The scarce coverage of these two important constitutional judgments only emphasizes that during the mid-1990s television hardly gave prominence to this important constitutional development concocted by the Court. The coverage of the Court was

116. The scarce coverage of the judgment phase in this case may be explained by the proximity between the day the judgment was published and Prime Minister Rabin’s assassination (11.4.95). However, the timing for publishing this important judgment was dictated by President Shamgar’s date of retirement. President Shamgar, who gave one of the major majority opinions, was about to finish his three months eligibility to give judgments after retirement. In an interview, Aharon Barak denied the idea that the judgment was given at that period in order to avoid media coverage and referred to Shamgar’s retirement as the sole reason for the timing of the judgment. See ARIEL L. BENDOR & ZEEV SEGAL, *THE HAT MAKER* 24 (2009). Shamgar’s retirement may explain the flood of other important and controversial judgments, in which Shamgar took part, published days after the assassination. HCJ 1031/93 Pessaro (Goldstein) et al. v. Minister of the Interior 49(4) PD 661 [1995] (Isr.); F.H.H.C. 4466/94 Nusseiba v. Minister of Fin., 49(4) PD 68 (Isr.); F.H.Cr.A. 2316/95 Ganimat v. Israel 39(4) PD 589 [1995] (Isr.). No doubt in “regular times” these judgments would have received at least some coverage. Shamgar however was not part of the panel in the Miller case, which was published on 11.8.95. HCJ 4541/94 Miller v. Minister of Defense 49(4) PD 94 [1995] (Isr.). In Miller, the Court ordered the Israeli Defense Forces not to disqualify female candidates for the posts of combat pilots based on their gender. *Id.* It is puzzling why the Court chose to publish such a controversial and important judgment only days after the assassination when the public’s attention was almost totally un-attentive to the Court.

117. HCJ 606/78 Ayoub v. Minister of Defense 33(2) PD 113 [1978] (Isr.).

118. HCJ 1715/97 Bureau for Inv. Advisors v. Minister of Fin. 51(4) PD 367 [1997] (Isr.).

119. In addition to the coverage of the judgment in this case, the oral hearing was also covered in one item.

extensive in that period but focused on its involvement in issues that were at the center of political debate.

However, it should be noted that both the item covering the oral argument and the item covering the judgment in the *Bank Hamizrchai* case¹²⁰ were focused on the constitutional issue (items 27469-94 from 11.27.94 (oral argument) and 25629-95 from 11.9.95 (judgment)). The reporter asserts in both items the constitutional importance of the case and the extended panel of judges. In the item covering the judgment, the reporter states that the judgment is a “precedent,” anchoring the Court’s authority of judicial review of legislation and asserting that “the Basic Laws of the Knesset are like a constitution.” Two professors, who were invited along with others by President Barak to interpret the judgment for the media, stress the importance of the judgment and that it confirms that a “constitutional revolution” did occur.¹²¹ Only towards the end of the item covering the judgment does the reporter add a sentence regarding the conflict “over the authorities of the courts vis-a’-vis the Knesset.” MK Bibi is interviewed and claims that “the Supreme Court took for itself the authority of a constitutional court. In that, I think, it defied the balance between the Knesset and the Court.” MK Bibi adds that he proposed a bill to change the situation by establishing a new constitutional court “like in Europe.” The reporter ends the item saying: “Judge Barak answers in the judgment: the role of a judge is to guard the constitution and to protect human rights.”

At the time in which a discussion of the Court’s judicial review authority was most relevant, the issue was scarcely covered and when it was covered, the Court’s new authority to interfere with the majority will was brushed away in television coverage. During those years, most constitutional scholars did not contest the constitutional revolution’s normative legitimacy in the public discourse.¹²² When Professor Ruth

120. CA 6821/93, *supra* note 103.

121. Professor Klein says that “for every jurist this is an historical day.” Doctor Zilbershats says that “this is an important judgment, we shall probably learn and speak of it for many years to come”

122. In recent years, several scholars have raised a stronger claim according to which legal scholars did not criticize the legitimacy of this development even in their professional writings. Hillel Sommer, *Richard Posner & Aharon Barak, The View from Abroad*, 49 HAPRKLIT 523, 531 (Isr.) (arguing that was almost no academic discussion on the unprecedented rise of judicial power in Israel); GIDEON SAPIR, *THE CONSTITUTIONAL*

Gavison, who was for many years the sole voice in the academia to question the legitimacy of the revolution in public discourse, dared to utter her critique in a 1999 public interview, she was heavily criticized by other law professors.¹²³ Professor Daniel Friedmann, who in 2007 would be appointed to the position of minister of justice partly because of his fierce critique of the Court's "creation of a constitution for Israel out of nothing,"¹²⁴ came to the defense of the Court. In a letter to the editor in reaction to Gavison's interview, Friedmann wrote that

criticizing the Supreme Court's adjudication is one thing. But to speak in the name of the values of the Ultra-Orthodox, as Professor Ruth Gavison did, and to put them on the same plain with the values adopted by the Knesset and developed and implemented by the Court, is a completely different thing.¹²⁵

A number of scholars attributed the change in the way Israelis imagine the Court to the "constitutional revolution." For example, in 1999 Menachem Hofnung argued that the 1992 Basic Laws have "caused the courts to be publicly perceived as partisan actors in the political arena whereas previously they were identified as neutral."¹²⁶ In 1998, Dan Avnon argued that, as a result of anchoring the "Jewish and Democratic" formula in the 1992 Basic Laws, the Court had to identify with a certain political philosophy. Subsequently, because of the "constitutional revolution," the public began to perceive the Court not as a neutral expert but as a politically biased institution.¹²⁷ Ran Hirschl is more ambiguous. In 2004, after public support for the Court had already plunged in public

REVOLUTION IN ISRAEL – PAST, PRESENT AND FUTURE 132-34 (2010) (Isr.) ("[T]here was almost no articles in the Israeli law reviews that criticized the Court's involvement in creating a constitution or raising doubts regarding its legitimacy.").

123. Ari Shavit, *So Said the Head of the Opposition*, HAARETZ, Nov. 12, 1999 (Isr.) (interviewing professor Gavison); Sommer, *supra* note 122, at 532-34 (describing the "hostile reactions" to Gavison's critique from her academic colleagues).

124. Daniel Friedmann, *A Tower Flying in the Sky*, YEDIOT AHARONOT, MOSEF 24 HOURS, Oct. 4, 2008, at 2 (Isr.).

125. Daniel Friedmann, *The Limits of Critique*, MOSEF HARRETZ, Dec. 10, 1999, at 6 (Isr.).

126. Hofnung, *supra* note 36, at 36.

127. Avnon, *supra* note 36, at 538, 543. See also Dan Avnon, 'The Enlightened Public': *Jewish and Democratic or Liberal and Democratic?*, 3 MISHPAT UMIMSHAL 417, 420, 426 (1996) (Isr.).

opinion polls, Hirschl was careful in attributing the erosion in the Court's image as "an autonomous and politically impartial arbiter" to the 1992 constitutional revolution. Well aware that this shift in public perception of the Court cannot be attributed to its relatively non-salient activity of judicial review of legislation, Hirschl chose his words carefully. He wrote that "the negative impact of the judicialization of politics on the Supreme Court's legitimacy is already beginning to show its mark."¹²⁸ The "judicialization of politics" began in Israel before 1992 and thus hinders Hirschl's thesis that puts emphasis on the legislation of 1992 Basic Laws as its focal point.¹²⁹ Thus, Hirschl does not attribute the change in the Court's image to the 1992 "constitutional revolution." He writes that as a result of the Court's authority to review "political arrangements and public policies agreed upon in majoritarian decision-making arenas" (i.e. decisions and decrees by the executive rather than solely legislation), "the Court and its judges are increasingly viewed by a considerable portion of the Israeli public as pushing forward their own political agenda, one identified primarily with the secular-liberal sector of Israeli society."¹³⁰

The data presented show that the change in the Court's public image that occurred in television coverage between 1993 and 1996 was not triggered by the constitutional revolution. The amount of coverage dedicated to the constitutional revolution was scarce. Moreover, the Court's mythical image was starting to crumble between 1993 and 1996 not due to criticism of the judges' authority to review legislation but mostly due to criticism of the Court's involvement in politics in items unrelated to its new founded constitutional authority. The transformation of the Court into a political institution in the public mind was made through "low politics" and not through issues of "fundamental politics," such as the definition of the state as Jewish and democratic that was anchored in the 1992 Basic Laws. While salient judgments such as

128. HIRSCHL, *supra* note 12, at 70.

129. HIRSCHL, *supra* note 12, at 21-24, 50 ("The recent history of constitutional politics in Israel presents a near-ideal illustration of my explanation of judicial empowerment. The hands that guided the 1992 constitutionlization of rights and the establishment of judicial review in Israeli were entirely visible . . .").

130. HIRSCHL, *supra* note 12, at 70.

Qa'adan,¹³¹ given in the early 2000s, may have caused further damage to the Court's perception as a neutral body because of its intervention in issues of fundamental politics, the initial shattering of its mythical image was achieved by presenting it as involved in low politics.

VI. SUPER CASES

Super cases are cases that "met television's criteria for coverage . . . [and] thus . . . received extensive coverage."¹³² Yet to be super is a relative thing. As opposed to the era before the 1990s, between 1993 and 1996, in an age of such extensive coverage of the Court, many cases received extensive coverage. I will focus only on three super cases and two additional cases that provide an interesting comparison to the era before the entrance of Channel Two.

The first super case, the judgment ordering the prime minister to dismiss his Interior Minister Aryeh Deri presents one of the most dramatic clashes between the Court and the prime minister in Israel's history. The judgment was given just before the entrance of Channel Two, and its coverage thus provides a very interesting point of comparison. The second case is a civil appeal. In my previous Article, I argued that the political aspect of civil and criminal appeals is more concealed and thus their coverage is less prone to damage the Court's mythical image.¹³³ Yet, for exactly this reason in the age of commercial television, these cases should be less attractive for television coverage. Two appeals received extensive coverage between 1993 and 1996. The first was the criminal appeal of the Nazi criminal John Ivan Demjanjuk which is discussed later in the Article.¹³⁴ The second was the civil appeal and further hearing in the *Nachmani Frozen Eggs* case. By examining the coverage of this civil appeal that is unconnected to the political arena, we may be able to better distill the prism through which the media covered the Court. The third super case was the Bar-Ilan Road controversy, the

131. HCJ 6698/95 *Qa'adan v. Israeli Lands Admin.* 54(1) PD 258 [2000] (Isr.), translated at http://elyon1.court.gov.il/files_eng/95/980/066/a14/95066980.a14.htm.

132. Bassok, *supra* note 2, at 344-45 (explaining the category of "super cases").

133. *Id.* at 331-32 ("[C]overage of civil and criminal cases provided better opportunities for presenting the Court as a more rigorous and formal institution, thus strengthening its mythical image.").

134. *See infra* Section VII.2.

most-covered case during the period discussed in my Article. The judgment in the case was given only in 1997, but in order to have a full picture of the controversy, I analyze its coverage until the 1997 final judgment.

In addition, I have chosen to examine two judgments, given in 1994 and 1996 that address the disqualification of non-Orthodox Jews from serving in religious municipal councils. Though these judgments did not receive extensive coverage, I have chosen them since they allow us to draw an effective comparison with the coverage of a similar case from 1987 in which a petition was submitted against the disqualification of a woman from serving in a religious municipal council. The results in all three cases are similar as the Court forbade these disqualifications. Thus, the comparison between the cases allows me to better isolate the influence of Channel Two's entrance into the arena.

1. On the Cusp of Change: Deri (1993)

In 1993, in the *Eisenberg* judgment, the HCJ disqualified Mr. Yossi Ginnosar from the appointment as the Director General of the Ministry of Building and Housing.¹³⁵ The *Eisenberg* judgment was the first in a long strand of judgments disqualifying candidates from the appointment of candidates to high public office and ordering the resignation of serving public officials based on the doctrine of "unreasonableness." The judgment was titled by academic commentators as a "landmark case" and a "blatant example of judicial activism."¹³⁶ However, it was covered only in one item (item 4953-93 from 3.23.93).

A few months later, in two of its most activist decisions to date, the HCJ ordered the prime minister to dismiss two government members (a minister and a deputy minister) against whom an indictment had been issued for bribery and fraud.¹³⁷ On the day the decisions were given, the

135. HCJ 6163/92 Eisenberg v. Minister of Bldg. 47(2) PD 229 [1993] (Isr.), translated at http://elyon1.court.gov.il/files_eng/92/630/061/Z01/92061630.z01.pdf.

136. Hofnung, *supra* note 36, at 43; BARZILAI, YUCHTMAN-YA'AR & SEGAL, *supra* note 20, at 37-38.

137. See Yoav Dotan & Menachem Hofnung, *Legal Defeats – Political Wins: Why Do Elected Representative Go to Court?*, 38(1) COMP. POLITICAL STUDIES 75, 88 (2005) (arguing that these decisions are "[t]he most striking example" of the Court's judicial activism).

coverage focused on the case that dealt with Minister of the Interior Aryeh Deri.¹³⁸ In total, the petition concerning Deri was covered in thirteen items. The reason for the extensive coverage is clear: the dismissal of Deri, the chairman of the powerful *Shas* Mizrahi ultra-Orthodox party, would influence the government's stability and thus the entire political arena. Indeed, in hindsight, some argue that *Shas* would have remained part of the coalition had Deri remained a minister. Gavison even goes so far as to claim that had the Court avoided giving this decision, Prime Minister Rabin's assassination might have been prevented since with *Shas* in the government, the Oslo accords would have enjoyed greater legitimacy among the Jewish public.¹³⁹ As was apparent in the 1970s and 1980s, whenever the Court appears as a player in a highly controversial political dispute, it is covered extensively.¹⁴⁰ The more prominent the affair in the political debate, the more extensive the coverage.

The coverage given to the judgment in Deri's case was very much in line with the coverage given to the Court's interventions in partisan politics between 1990 and 1991.¹⁴¹ In the items covering the judgment, almost all of the reactions praise the Court and emphasize its struggle against corruption. Even the lawyer who represented Deri only mildly criticized the Court by wondering whether the Court is not "positing itself above the Knesset." The reporter ended the report from the Court saying that "the Court deepened today its reach into the domain of the executive branch and put its hand on the government's table so as to enforce the rule of law there. The law is the ruler of the land and the Supreme Court showed today who enforces it." (item 17738-93, from 9.8.93). Even the item covering the reactions from the Deri camp does not contain any criticism of the Court, only a discussion of the way ahead in terms of *Shas's* place in the coalition (item 17739-93, from 9.8.93). Indeed, television coverage of the Deri judgment very much conformed

138. HCJ 3094/93 The Movement for Quality in Gov't v. State of Isr. 47(5) PD 404 [1993], translated at http://elyon1.court.gov.il/files_eng/93/940/030/Z01/93030940.z01.pdf.

139. See GAVISON, KREMNIETZ & DOTAN, *supra* note 5, at 147.

140. See Bassok, *supra* note 2, at 323, 330.

141. See *id.* at 351-53 (describing coverage of the Court's intervention in partisan politics between 1990 and 1991).

to the mythical image as it presented the Court as the last bastion against the corruption of the political system.¹⁴²

And yet there were two exceptions to the presentation through the mythical prism. First, in the item covering jurists' reactions, Professor Ruth Gavison criticized the judgment saying that the Court's decision to compel the prime minister to dismiss Deri is "problematic . . . dangerous and almost impossible . . ." (item 17740-93 from 9.8.93). Second, Prime Minister Rabin reacted in an interview to the Court's criticism in the judgment regarding his refusal to exercise his discretionary power of removal saying that while he supports the rule of law, "he is accountable to the voters and not to anyone else." (item 17741-93 from 9.8.93).

Before the judgment, television covered the prospects for the coalition, and for the peace process if the Court compelled the prime minister to dismiss Deri (item 16324-93, from 8.19.93; item 17160-93, from 8.30.93). These items were prepared by political reporters rather than by the legal one. While the items covering the hearings in the case, prepared by the legal reporter, presented the controversy from the angle of the State Attorney's difficulty in presenting Prime Minister Rabin's position before the Court in view of the State Attorney's conflicting legal position (items 15603-93, from 8.10.93; 16324-93, from 8.19.93; 17161-93, from 8.30.93), the items prepared by political reporters dealt with the same controversy from the low-politics angle. They discussed Rabin's anger toward the Attorney General and the possibility that the Attorney General would be sacked. Very few references were made in the political items on the criteria by which the Court would decide the case. Comments made by the judges during the hearings were quoted in these items solely as hints of the possible results of the petitions, without bringing any of the legal reasoning given to support them (i.e., President Shamgar alluded that Deri will need to resign etc.). The connection was immediately made between the comment and the influence a possible result would have on the political arena (item 17160-93, from 8.30.93). While the Court was not criticized, even by *Shas*' representatives, it was presented in the items focused on the political arena as just another

142. *See id.* at 353 ("[T]he intervention by the HCJ in the political arena only strengthened its image as the last bastion against the corruption of the political system, the only trustworthy objective institution willing to hear and respond to the public's grievances.").

player in the political domain whose decisions would affect the government's ability to survive, as well as the peace process. The ability to cover the Court through the political angle fitted well with television's biases,¹⁴³ and as the Court supplied more occasions for coverage of its involvement in the political arena, it also undermined its image as detached from politics.

2. The Nachmani Frozen Eggs Judgments (1995-96)

Ruthie and Danny Nachmani started a process of in vitro fertilization after Ruthie's womb had been removed due to cancer. The couple fertilized eleven of Ruthie's eggs with Danny's sperm and froze the embryos for future use. Several years into the process, after having already signed an agreement with a center for surrogacy based in the United States, Danny left the marital home for another woman, with whom he had two daughters. He refused to let Ruthie continue on her own with the process of finding a surrogate to carry the fertilized eggs. Ruthie filed a lawsuit to obtain the embryos. The trial judge held that Danny breached his agreement with his wife. Since he had already fertilized Ruthie's eggs, he could not withdraw his agreement to have a child with her. A five-judge panel of the Supreme Court reversed the ruling, in a 4 to 1 decision, and held that Danny had a fundamental right not to be forced to be a parent and that the agreement was unenforceable because the originally-contemplated performance was now impossible.¹⁴⁴ An eleven-judge panel of the Supreme Court, the largest panel ever in that period, reheard the appeal. On September 1996 the seven judges in the majority reversed the decision of the five-judge panel and awarded the embryos to Ruthie. They found that no statutes or precedents applied

143. Cf. SLOTNICK & SEGAL, *supra* note 54, at 110-16 (describing how the *Bakke* case "allowed reporters to cover a Supreme Court case in a fashion that eliminated many of the liabilities associated with reporting on the Court. By focusing on the White House and the Justice Department, sources could be used, political implications teased out, and drama heightened. This was now a story with a plot, intrigue, shifting tides, and winners and losers, angles clearly more suited to television coverage than legal arguments and actual court proceedings.").

144. CA 5587/93 Nachmani v. Nachmani 49(1) PD 485 [1995] (Isr.), translated at http://elyon1.court.gov.il/files_eng/93/870/055/Z01/93055870.z01.htm.

to this case and decided that the harm to Ruthie outweighed the harm to Danny.¹⁴⁵

The *Nachmani* affair was covered in eight items, a very unusual amount for civil appeals. But in view of the dramatic ingredients of this affair, the extensive coverage is not surprising.¹⁴⁶ The case presented a conflict between a husband and a wife, offered a clear-cut decision on matters of life and death and dealt with a highly emotional issue. In addition, the Court's decision offered a fierce controversy between the judges. All these ingredients made the *Nachmani* affair extremely attractive for television coverage.¹⁴⁷

The legal academy acknowledged that the Court's decisions were value-based, and Dapahna Barak-Erez even mildly criticized the Court for its attempt to conceal the value-laden basis of its first decision (the judgment on the appeal) and present its decision as value-neutral.¹⁴⁸ David Heyd emphasized the difficulty of being able to discern between the moral aspect and the legal aspect in the Court's final judgment.¹⁴⁹ Several of the judges indeed referred to this difficulty in their judgment. Judge Goldberg noted that "[t]his dispute does not essentially fall within the framework of an existing legal norm . . . It lies entirely in the realm of emotion, morality, sociology and philosophy. This explains the normative void and the inability of accepted legal rules to provide a solution to the dispute."¹⁵⁰ Judge Türkel added that "objectivity, in a case like ours . . . is a myth and nothing more."¹⁵¹

The coverage on Channel One presented the Court as moving from a decision based on the law in the appeal phase to a decision based on

145. *Id.* See also Ruth Halperin-Kaddari, *Redefining Parenthood*, CAL. W. INT'L L.J. 313, 317-18 (1999) (explaining the judgment); April J. Walker, *His, Hers or Ours? - Who Has the Right to Determine the Disposition of Frozen Embryos After Separation or Divorce?*, 16 BUFF. WOMEN'S L.J. 39, 56-59 (2008) (same).

146. See David Heyd, *Legal and Moral Justice: The Nachmani Case Reconsidered*, 29 MISHPATIM 507, 507 (1998) (Isr.) ("The affair known as 'the Nachmani affair' has all the ingredients of a legal drama of the modern media age.")

147. Cf. HALTOM, *supra* note 39, at 16-17, 74, 76-77, 137, 235; DAVIS, *supra* note 69, at 74-76; SLOTNICK & SEGAL, *supra* note 54, at 46-48, 154-55, 185-86.

148. See Dapahna Barak-Erez, *Symmetry and Neutrality: Reflections on the Nachmani Case*, 20 TEL AVIV UNIV. L. REV. 197, 211, 218 (1996) (Isr.).

149. See Heyd, *supra* note 146, at 508-11, 525.

150. CFH 2401/95 *Nachmani v. Nachmani* 50(4) PD 661, 723 (Isr.).

151. *Id.* at 743-44.

morality in the further hearing phase. Danny's lawyer said in one of the items covering the judgment in the appeal that the Court's ruling is "undoubtedly the victory of logic over emotions." (items 9703-95, 9702-95 from 3.30.95). In an item broadcast a day before the decision in the further hearing phase was given, the reporter, Michael Doron, noted that the decision is "a philosophical-legal dilemma but above all a moral dilemma." (item 21953-96, from 9.11.96).

The coverage of the Court's final judgment in the affair opened the news edition. The report on the decision and the following discussion in the studio afterwards carried on for almost seven minutes. The report asserted: "today begins also a new day at the Supreme Court with some question marks. Did the judges get carried away by their feelings? Did their hearts go out to Ruthie Nachmani, swept by public sympathy?" Judge Türkel is presented as "new to this panel of judges and to this Court." On the screen, the following part of his judgment is quoted: "the result I have reached is not merely the result of legal analysis but also of intuition and internal feeling."¹⁵² The majority decision is presented as based on emotion: "the majority thought that they should support parenting, support life and took into consideration that this is Ruthie's last chance to become a mother." Immediately afterwards, and in contrast to the majority, the reporter notes that Judge Zamir's minority opinion is based on the "fertilization law." The reporter presents the sharp controversy between the minority and the majority and adds that "Judge Zamir, in the minority as well, fiercely criticizes his colleagues." (item 22268-96, from 9.12.96).

Objectivity and decisions according to legal criteria were central parts of the Court's mythical image. Until 1993, the Court was presented as an "empire of law, and not of men."¹⁵³ Yet the *Nachmani* majority judgment was presented as based not on the law, but on emotions. The coverage might have depicted accurately the Court's ruling in the sense that the majority judgment in the further hearing phase relied heavily on the

152. *Id.* at 741.

153. Bassok, *supra* note 2, at 308 ("[U]ntil 1993, by and large, television presented the Court as a neutral, professional, objective, independent, apolitical, and moral institution that reached its decisions in accordance with the law.").

notion of justice, while the minority focused on the law.¹⁵⁴ Yet it is quite startling to see how even in a civil case in which the “legal algorithms”¹⁵⁵ are supposed to be more apparent in coverage than in the coverage of petitions to the HCJ,¹⁵⁶ the mythical image has been eroded. The decision in the further hearing was not presented as a result of objective legal expertise but as a struggle between the judges. Moreover, the Court’s image as standing above public opinion was eroded by the report’s rhetorical question of whether the judges were “swept away by public sympathy.”

3. Religious Councils (1994, 1996)

In 1987, the Court ruled in *Shakdiel* that female candidates could not be disqualified from membership in religious councils based on their gender.¹⁵⁷ As the coverage showed, the ruling fueled criticism of the Court from the religious establishment. Yet, at least in their covered reaction, the critics did not doubt the judges’ motives or raise complaints about their political affiliation. They “expressed sorrow” over the ruling (reaction read by the anchor following item 5994-88, from 5.19.1988) and in an official statement by the Chief Rabbinate of Israel the council called the judgment “an unjustified intervention by a secular tribunal in religious life in Israel.” The council expressed “its utmost protest” (item 6336-88, from 5.30.88). However, the reporter noted that the “Chief Rabbis contest the claim that in their critique of the secular legal system they challenge its authority, on the contrary.” When the reporter asked the Sephardi Chief Rabbi, Mordechai Eliyahu, whether their statement was not a “declaration of war,” Rabbi Eliyahu reacted by asking “why?”

154. See Janie Chen, *The Right to Her Embryos, An Analysis of Nahmani v. Nahmani and Its Impact on Israeli in Vitro Fertilization Law*, 7 CARDOZO J. OF INT’L & COMP. L. 325, 348 (1999).

155. See Jack M. Balkin & Sanford Levinson, *Law and Humanities: An Uneasy Relationship*, 18 YALE J.L. & HUMAN. 155, 159 (2006).

156. Cf. Richard A. Posner, *The Supreme Court, 2004 Term: Foreword: A Political Court*, 119 HARV. L. REV. 31, 79-80 (2005) (“Nonconstitutional cases provide protective coloration. Not because there aren’t plenty of indeterminate statutory cases, especially in the sample that reaches the Supreme Court, but because no one doubts that a court is ‘doing law’ when it is deciding statutory cases.”).

157. HCJ 153/87 *Shakdiel v. Minister of Religious Affairs* 42(2) PD 221 [1988], translated at http://elyon1.court.gov.il/files_eng/87/530/001/Z01/87001530.z01.htm.

but stressed that in his view the only way to resolve the crisis was for the HCJ to back off. The Ashkenazi Chief Rabbi, Avraham Shapira, explained the council reaction by noting that in “the Halacha [Jewish law] only rabbis decide and not those who are not people of Halacha.”

In 1994, the Court ruled in *Hoffman*¹⁵⁸ that when choosing representatives to the Religious Council, the Local Council could not disqualify a candidate for membership simply because she belonged to the Reform or Conservative movements of Judaism (most practicing religious Jews in Israel identify themselves with the Orthodox branch). The reporter noted that in the religious councils “there are preparations for battle, for them this is a matter of be killed but do not transgress. The members of the religious councils threaten to resign the moment the first Reform candidate is nominated to the council.” In this spirit, Arye Gamliel (*Shas*), the Deputy Minister of Religious Services, condemned the judgment and stressed that he will not sign the required documents for fulfilling the ruling, “even if I have to resign.” (item 2453-94, from 1.26.94). Less than a month later, television showed a meeting of the religious councils’ heads with the two Chief Rabbis, assembled in order to decide how to react to the Court’s ruling. Their decision was in essence to defy the ruling by refusing to sit together with non-Orthodox representatives. The conservative movement’s reaction, read by the anchor, called the Orthodox representatives to stop their “subversive” action against the Court’s authority (item 4549-94, from 22.2.94).

The religious councils indeed refused de-facto to comply with the *Hoffman* ruling.¹⁵⁹ As a result, in 1996, the Court ruled again in *Naot*¹⁶⁰ that religious non-Orthodox candidates could not be disqualified from membership in religious councils based on their “world view.”¹⁶¹ Again, the reactions by the Rabbis in the item covering the judgment were much harsher in comparison to the *Shakdiel* judgment.

The HCJ ordered the Jerusalem City Council to elect new representatives in a manner that ensured the election of non-Orthodox

158. HCJ 699/89 Hoffman v. The Municipal Council of Jerusalem 48(1) PD 679 [1994].

159. See Ofrif Liviatan, *Judicial Activism and Religion-Based Tensions in India and Israel*, 26 ARIZ. J. INT’L & COMP. L. 583, 609 (2009).

160. HCJ 4733/94 Naot v. The Municipal Council of Haifa 49(1) PD 111 [1996].

161. SUZIE NAVOT, *THE CONSTITUTIONAL LAW OF ISRAEL* 312 (2007) (discussing the judgment).

candidates. Rabbi Meir Porush, an Orthodox member of the Jerusalem City Council, said in reaction that “with all due respect to Supreme Court judges, my hand will be cut off before [voting for non-Orthodox candidates] and I will not raise my hand to promote Reforms and Conservatives. For me this simply cannot happen.” (item 3748-96, from 1.1.96). The reporter then added that “this is another battle in the war of the Religious people on the authority of the Supreme Court.” Later in the item the reporter asked Jerusalem’s Chief Rabbi Yitzchak Kolitz whether he would sit with Reform and Conservative representatives. Kolitz answered: “they will not sit here.” Haifa’s Chief Rabbi She’ar Yashuv Cohen was then interviewed in the studio by the anchorman, Haim Yavin. Yavin kept interrupting Cohen’s attempt to explain the complexity of his position demanding that he answer one question: will he will obey the Court’s judgment. At one point Yavin tries to summarize the interview saying that “it seems to me that the headline of our conversation is that you will obey the HCJ’s ruling.” Yet Cohen resisted Yavin’s attempt to capture his position in a soundbite and stressed: “I did not say that.” (item 3749-96, from 1.1.96). No doubt the tone of the items was milder because of the atmosphere after the assassination of Prime Minister Rabin, which had occurred only two months earlier. Some of the speakers did indeed make a connection between the reactions to the judgment and the lessons of the assassination. Yet, two of the Rabbis still openly declared that they would not comply with the Court’s ruling.

4. The Bar-Ilan Road Controversy (1996-1997)

In 1996, the Court held multiple hearings in petitions against the Central Traffic Authority regulation to partially ban vehicular traffic on a major road in Jerusalem (the Bar-Ilan road) during the hours of prayer on the Jewish Sabbath.¹⁶² The road was a thorough-fare connecting the northern entrance to Jerusalem with its northern neighborhoods and traversed an area heavily populated by ultra-Orthodox.¹⁶³ While the final

162. HCJ 5016/06 Horev v. Minister of Transp. 51(4) PD 1 [1997], *translated at* http://elyon1.court.gov.il/files_eng/96/160/050/A01/96050160.a01.htm.

163. See ISSACHAR ROSEN-ZVI, *TAKING SPACE SERIOUSLY* 103 (2004) (describing the controversy).

judgment in the case was given only in 1997, the hearings and interim decisions of the Court were covered in eighteen items during 1996 (19.4% of the total items broadcast in 1996). In its final judgment the Court ruled in favor of the petitioners who challenged the decision to close the road. It vacated the decision and remanded the issue to the Minister of Transp. However, the four majority judges found that closing the road could be reasonable as long as an arrangement was made for the secular minority living in the ultra-Orthodox neighborhoods. Throughout the period in which the case was adjudicated, violent mass demonstrations of ultra-Orthodox, became a frequent event on the road and in its vicinity. To a much lesser extent, seculars demonstrated on the road as well.¹⁶⁴

The coverage presented the affair as a struggle between religious residents (especially ultra-Orthodox) and secular residents of Jerusalem that was decided by the Court in favor of the secular side. While the secular speakers, all of whom were affiliated with leftist parties, gave complimented the Court and promised to honor its decisions all throughout the process of litigation (item 20309-96 and 20310-96, from 8.15.96; item 19850-96, from 8.10.96), the religious politicians and the rabbis spoke in a completely different tone. The Deputy Mayor of Jerusalem at that time, Rabbi Chaim Miller, noted after one of the hearings at the HCJ that he had “concerns the Court have become a branch of *Meretz* [a leftist party] and we should take this under advisement.” (item 18269-96, from 7.12.96). Deputy Minister Yigal Bibi spoke of a “judicial dictatorship that does not exist anywhere else. Who chose them to determine this? There is a chosen municipality, a chosen transportation Minister, so they [the HCJ] need to decide?” MK Shaul Yahalom (National Religious Party), who served at that time as the chairperson of the Constitution, Law and Justice Committee of the Knesset, commented that the Court “oversteps its judicial role and begins to set norms and values and this is the role of the democratic system.” Deputy Minister Meir Porush (United Torah Judaism) expressed his distrust of the Court by cynically suggesting the adoption of American mediation for the Bar-Ilan controversy as was done in Hebron in that period in *Al-Shuhada* Street. He further raised the option of what is

164. See *id.* at 103-05.

nicknamed “a law by-passing Bagatz,” i.e., a law that would overturn the HCJ’s ruling.

Minister of Transport Yitzhak Levy (National Religious Party), who also served during that period as a member of the judicial selection committee, was extremely careful in his reaction to the final judgment. As the minister entrusted to implement the HCJ judgment in the following months, he promised to “study the judgment” in order to close the street during times of prayer without defying the Court’s decision. The reporter asked him whether more religious judges on the Court would have made a difference. Levy refused to answer the question “at this point in time” but the reporter added that at the meeting of all religious MKs convened in the wake of the decision, “many said that it is about time to implement the election results in the Supreme Court so that its composition will properly reflect the percentage of religious people in Israel. In the meantime, the religious representatives promise that the HCJ’s decision is only a temporary victory for seculars.” (item 8883-97, from 4.13.97).

Unlike in earlier periods, the reporters interviewed not only the parties involved in the case, politicians and rabbis, but also passers-by on the Bar-Ilan road. This decision to solicit reactions to the Court’s decisions from people “on the street” had a grave influence on the tone of coverage, since the ultra-Orthodox interviewees tended to be more dramatic in their reactions as well as much blunter in their accusations against the Court. One person called the Court “anti-religious,” another one promised that “blood will be spilled on the street” (item 20310-96, from 8.15.96); another person stated his intention to defy the decision by lying on the road (item 8884-97, from 4.13.97). In one item, the reporter noted that Bar-Ilan residents said that for them, “the Bagatz [the HCJ] does not exist, it is a branch of *Meretz*, for them it is only the Badaz [the ultra-Orthodox community’s tribunal].” (item 19391-96, from 8.3.96).

While ultra-Orthodox Israelis were probably never among the Court’s admirers,¹⁶⁵ the exposure of their deep animosity toward the Court to the non-ultra-Orthodox audience was new in television coverage. My claim is not that exposure of their critique had any persuasive power on non-

165. They were under-represented in many of the public opinion polls that demonstrated a high level of public support for the Court. See Bassok, *supra* note 2, at 318 n. 49.

ultra-Orthodox Israelis. My point is that due to the visibility given to their reactions, the Court lost its status in coverage as an institution that is beyond and above the political debate. Criticism against it was uttered now in the same language and in the same manner as against other players in the political arena. This change in the Court's image was of serious importance. Since the 1980s it was clear to any reader of the Court's judgments that it is an avid supporter, if not the leader, of Israel's secular-liberal camp.¹⁶⁶ Yet, until 1993, the Court paid no price in terms of its image as being positioned above politics even when it directly interfered in the political arena.¹⁶⁷ The loss of its status as a neutral arbitrator in the public-mind – a status vital for its institutional legitimacy¹⁶⁸ – occurred only after the entrance of Channel Two. Only then did the Court's portrayal in the Israeli social imaginary shift.

Moreover, television did not describe the controversy in distinct legal terms. The coverage did not present the Court as an expert. Judges were not depicted as deciding the case based on their superior knowledge in the legal domain. Indeed, the framing of the Court as just another political institution, an institution that was directed by the judges' ideological or even partisan orientation had become so ingrained that, without flinching, the reporter asked the minister of transport about the appointment of more religious judges to the Court. The framing of the Court as an apolitical institution directed solely by legal expertise was no longer in control. Many scholars argue that expertise is the firmest basis

166. See MAUTNER, *supra* note 17, at 144 (“The Court, then, joined the Jewish-secular-liberal group . . . and cooperated with them closely and consistently to defend the values of Western liberalism they shared in common by making the Court a significant venue for promoting that group's values and positions.”).

167. See Bassok, *supra* note 2, at 351-53 (“These examples of the Court's activism and involvement in the heated political struggle had the potential to undermine the Court's mythical image However, the mythical image was so persistent that instead the Court's actions were presented as apolitical, standing in direct contrast with the wheeling and dealing of the political arena.”).

168. See GAVISON, KREMNIETZ & DOTAN, *supra* note 5, at 275 (arguing that a belief in the Court's neutrality is essential for its institutional “capital”); Tyler & Mitchell, *supra* note 95, at 713-14 (arguing in the context of the American Supreme Court that “[t]he data analyzed support the argument made by the Justices in Casey (as well as by legal scholars such as Fiss) that perceptions of political neutrality bear an important relationship to Court legitimacy.”).

for both the normative and sociological legitimacy of courts.¹⁶⁹ True, in one item the reporter mentions the Court's suggestion for compromise: opening a road in another nearby street that was closed for Shabat, while closing the Bar-Ilan road (item 4656-97, from 1.12.97). Yet this kind of suggestion does not reflect any legal expertise.

Perhaps most interestingly, the coverage presented the judgment as a defeat for religious Israelis. While the Court did decide to overrule the regulation to close the road, it left the minister of transport the option to reissue the regulation to close the road once an arrangement for secular residents was provided. This path was indeed taken.¹⁷⁰ Television failed almost completely to present this complexity. The minister of transport was the only one who explicitly discussed this option in the items covering the affair (one of the reporters alluded to this option in item 8882-97, from 4.13.97). Thus, the Court may have intended in its *Horev* judgment to "lower the stakes of politics" by using balancing to transform a "dispute that was viewed as a bitter cultural war and a matter of fundamental principle into a simple trade off that most reasonable people would accept."¹⁷¹ But this line of thought did not comply with commercial television's biases and thus at least Channel One failed to spread this message.

The tendency of commercial media to prefer dramatic decisions with clear winners and losers led to simplistic coverage. The legal language game was neglected in television coverage and replaced by the political language game that better fits televisions' biases as a medium. Television

169. See, e.g., RICHARD BELLAMY, *POLITICAL CONSTITUTIONALISM: A REPUBLICAN DEFENSE OF THE CONSTITUTIONALITY OF DEMOCRACY* 87 (2007) ("Judges do not derive their authority from being modern Solomons. Rather, they are expected to be experts on, and impartial appliers of, the law."); Robert C. Post & Neil S. Siegel, *Theorizing the Law / Politics Distinction: Neutral Principles, Affirmative Action, and the Enduring Legacy of Paul Mishkin*, 95 CALIF. L. REV. 1473, 1507-09 (2007) (explaining that the central premise of the legal process jurisprudence "is that faithful compliance with professional norms is in the long run the best hope for legitimating the legal system."); Or Bassok, *The Two Counter-majoritarian Difficulties*, 31 ST. LOUIS U. PUB. L. REV. 333, 343-50 (2012) (surveying various interpretative approaches that offered solutions to the counter-majoritarian difficulty based on judicial expertise).

170. ROSEN-ZVI, *supra* note 163, at 106 (describing the developments following the judgment).

171. See Moshe Cohen-Eliya & Iddo Porat, *Proportionality and the Culture of Justification*, 59 AM. J. COMP. L. 463, 470-71 (2011).

that functions according to its biases, rather than “a televised newspaper,” favors more inclusive and participational language and thus may erode in its coverage any claim to authority based on an expert knowledge.¹⁷² This was a complete shift from the era until 1992 when the Court was presented as a legal expert deciding highly political controversies according to a professional apolitical criterion.¹⁷³

VII. SURVIVING REMNANTS OF THE MYTHICAL IMAGE

1. Petitions Made by Bereaved Families

In the coverage of petitions submitted by bereaved families the mythical image of the Court was alive and well in television coverage between 1993 and 1996. Though most of the petitions covered were dismissed by the Court, the families did not present any claim that the Court was politicized or biased in favor of the military.

The first item covering a petition submitted by a bereaved family was broadcast in December 1992 (the *Yismach* case¹⁷⁴; item 20617-92, from 12.3.92). However, the relatively extended coverage began in 1994. Scholars who have analyzed the “politics of bereavement” claim that following the training accidents of 1991-1992, the families’ struggle started to change. The families “adopted an unanticipated model of behavior: they petitioned directly to the Supreme Court.”¹⁷⁵ The media played a crucial role in this change. *Mabat* covered petitions that dealt with the criminal trials of commanders involved in training accidents. It also covered, among others, a family’s petition to add the names of a soldier’s siblings to his uniform headstone in the military cemetery (The *Wechselbaum* cases¹⁷⁶; items 26069-94, from 12.4.94; 9339-95, from 3.27.95), and a petition challenging the promotion of an officer to the position of Commander of the IDF’s Officers School based on his

172. See MARSHALL MCLUHAN, UNDERSTANDING MEDIA 82 (1995).

173. See Bassok, *supra* note 2, at 358.

174. HCJ 4353/92 *Yismach* v. The Attorney General (unpublished) (Isr.).

175. Udi Lebel, *Cracks in the Mirror of Military Hegemony: The Courts and the Media as Agents of Civil Society*, in PUBLIC POLICY IN ISRAEL: PERSPECTIVES AND PRACTICES 205 (Dani Korn ed., 2002).

176. HCJ 5688/92 *Wechselbaum* v. Minister of Defense 47(2) PD 812 [1992] (Isr.); A.H. 3299/93 *Wechselbaum* v. Minister of Defense 49(2) PD 195 [1995] (Isr.).

alleged responsibility for a soldier's death during a routine military practice (The *Shoshan* case¹⁷⁷; items 18594-96, from 7.26.96; 22950-96, from 9.25.96; 25307-96, from 10.27.96; 25745-96, from 11.6.96).

The coverage of these petitions presented the Court's hearings in a very detailed manner. Offers by the judges for compromises were presented in several of the items (items 13976-94, from 6.17.94; 1603-97, from 12.5.96; 23832-96, from 10.10.96). The Court's image in these items is of an institution that is highly sensitive to the families' emotional demands but knows how to balance these demands with Israel's security needs. Though the families were at times critical of the Supreme Court, the coverage of their reactions presented a contrast between the unjust military system (including military courts) and the just Supreme Court (see for example, item 27642-94 from 11.30.94).

Even though the Court has devoted serious attention to petitions by bereaved families, the legal academy has yet to devote attention to these petitions as a distinct category since most of the Court's decisions do not contain any distinct legal doctrines that necessitate a separate analysis.¹⁷⁸ However, as for the relationship between the media and the Court, this category is unique. In the items covering the families' petitions, television continued to present the Court as a consensual institution, the last bastion trusted by families who have lost their faith in "the system." But television did more. It presented the Court not only as the last legal forum for the families to raise their grievances, but also as the "campfire" of Israeli society where the claims of the families were addressed. In this spirit, a lawyer who represented a bereaved family whose son was killed by "friendly fire," stated after the Court's oral hearing: "the story of a needless, mistaken death of a person needs to be told in some public arena, in a public forum where everyone comes and perhaps there is some kind of catharsis that the story is told and the factual questions are discussed and there is a final factual determination of what happened, who is to blame, what is the responsibility of each party." (item 12436-95 from 5.1.96). This function of the Court as

177. HCJ 4537/96 *Shoshan v. Chief of the General Staff*, 50(4) PD 416 [1996].

178. *But see* Ran Hirschl, *Civil Society v. The State of Israel: Two Conceptual Notions in Current Discussion on Civil Society and their Place in the Supreme Court Adjudication*, in ISRAEL: FROM MOBILIZED TO CIVIL SOCIETY? 305, 325-27 (Yoav Peled & Adi Ophir eds., 2001) (Isr.).

Israel's campfire cannot of course be achieved unless the media covers these petitions.

The judges themselves acted in these petitions in a manner very much in line with this vision of the Court as Israel's campfire. On two different occasions, the hearing in the *Shoshan* case and the judgment in the *Shafran* case, the judges stated that the petitioners achieved their goal by stirring up a public discussion as a result of the submission of their petitions.¹⁷⁹ Both sayings were covered by television (items 27642-94, from 11.30.94; 25307-96 from 10.27.96).

2. Demjanjuk's Appeal (1991-1993)

The coverage of John Demjanjuk's criminal appeal, which began in 1991 and ended in 1993, closely conformed to the mythical image. The appeal focused on whether Demjanjuk was the guard nicknamed Ivan the Terrible at the Treblinka Nazi concentration camp. As crime television series such as *Law and Order* or *CSI* demonstrate, questions of identification are very suitable for commercial television. And indeed, in the items broadcast in preparation for the Court's judgment, the legal reporter Shlomo Arad did extraordinary work in describing this narrow question, in a very detailed analysis of the evidence in this highly emotional case (items 13938-93, from 7.23.93; 14378-93 from 7.28.93). The availability of footage from the district court's proceedings, which was filmed in its entirety, contributed to the high level of coverage; certain parts of the trial were shown in the items. For the first in its history, the Supreme Court's reading of a small portion of the judgment acquitting Demjanjuk was broadcast in its entirety on live television. It was later reshowed in *Mabat* (item 14605-93, from 7.29.93).¹⁸⁰ The reasoning for the acquittal was not covered beyond the small portion of the judgment that was read, and television turned immediately to cover the reactions and the consequences of the judgment. Yet, in all the items, the Court was presented as the most qualified institution to decide the question.

179. HCJ 4537/96 *Shoshan v. Chief of the General Staff*, 50(4) PD 416; HCJ 6009/94 *Shafran v. the Chief Military Prosecutor*, 48(5) PD 573 [1994] (Isr.).

180. CrimA 347/88 *Israel v. Demjanjuk* 47(4) PD 221 [1993] (Isr.).

After the acquittal, many speakers expressed their pride in the Court's ability to provide justice for Demjanjuk, who, even according to the Court's judgment, was a low-level Nazi in the *Sobibor* extermination camp. The anchorwoman quoted Justice Minister Libai's comment that "the Supreme Court proved to the entire world that Jewish judges can conduct a fair trial in Jerusalem even of someone who was accused and convicted of crimes against the Jewish people." A high-school student who attended the judgment's reading said, in an interview in the Court building, "this shows how our legal system tries not to convict any innocent person even if there is only really a small doubt" (item 14605-93, from 7.29.93). Lawyer Moshe Negbi added from the studio "this judgment honors the Israeli legal system." (14608-93, from 7.29.93). In an item filmed in the American city where Demjanjuk lived before his extradition to Israel, a Jewish person interviewed noted that "nowhere in the world would a man have gotten more justice than in the State of Israel" (item 14609-93, from 7.29.93). Haim Cohen, a former Supreme Court judge added in another item that he was happy that the judges stood firm against the populist thirst to "do revenge against the Gentiles." (item 14578-93, from 7.30.93). Holocaust survivors did criticize the Court, saying that the judges "were mistaken, they carried out an injustice . . . history will judge them." (Yosef Charny in item 14605-93, from 7.29.93). But their voice was quite dimmed by the general tone of appraisal of the Court's judgment.¹⁸¹

After the acquittal, several petitions were submitted to the Court challenging Demjanjuk's release from prison and the decision to deport him, given the Court's explicit assertion that Demjanjuk was a Nazi guard at the *Sobibor* death camp.¹⁸² All the petitions were denied,¹⁸³ but the hearings and decisions in these petitions received extensive coverage

181. Demjanjuk was later convicted by a German court of being an accessory to the murder of 28,060 Jews as a low-level Nazi at the *Sobibor* death camp. Demjanjuk died while his appeal was still pending and thus his former conviction was invalidated. See Karin Matussek, *Demjanjuk Convicted of Helping Nazis to Murder Jews During the Holocaust*, BLOOMBERG (May 12, 2011, 11:15 AM), <http://www.bloomberg.com/news/2011-05-12/demjanjuk-convicted-of-helping-nazis-to-murder-jews-during-the-holocaust.html>.

182. It should be noted that the Court had the authority to convict Demjanjuk for different crimes than those he was indicted for. The Court explicitly rejected this option.

183. HCJ 4162/93 Federman v. The Attorney General 47(5) PD 309 [1993] (Isr.); F.H.HCJ 4757/93 Federman v. The Attorney General (unpublished).

(items 14800-93, from 8.1.93; 14965-93, from 8.14. 93, 16200-93, from 8.18.93; 16252-93, from 8.20.93). The coverage in these items had quite a different tone. One of the petitioners, the extreme Right-wing activist Noam Federman, spoke of the Court's desire "to look good in the eyes of the world." Holocaust survivors spoke now more freely against the decision to release Demjanjuk, and a representative of the Wiesenthal Center criticized the Attorney General's decision not to charge Demjanjuk for his actions in *Sobibor*. These items (and to a lesser extent the focus on reactions to the acquittal in the coverage of the judgment in Demjanjuk's criminal appeal) demonstrated how commercial media's biases affected the coverage.

3. The Court's New Building

Until 1992, the Supreme Court was situated in a section of a Russian Church built in the 19th century.¹⁸⁴ The exterior of the building, which today serves as the Jerusalem Peace Court, was rarely shown in television coverage. The building's inner hallways and the dense courtroom were filmed more frequently (for example, item 14828-89, from 11.7.89).

Since 1992, the Supreme Court has resided in its new dwelling located in the Government Complex (*Kiryat HaMemshala*) in Jerusalem. Since television could not broadcast the hearing of cases until only recently,¹⁸⁵ least of all present the decision-making process, in almost every filmed item covering the Court during the period between 1993 and 1996, some of the visuals presented are of the Court's impressive building, the spacious hallways, the courtroom, the panel of judges entering the courtroom, and the judges and litigants in their seats. With the rise in coverage in filmed items the saliency of this footage had become very high. These pictures create a very different image of the Court than the image created by a report read by an anchor without any accompanying pictures.

All ceremonial characteristics presented in these filmed reports—the judges and lawyers wrapped in robes; the litigants and courtroom

184. See DAVID KROYANKER, JERUSALEM ARCHITECTURE 152 (2006) (Isr.).

185. In September 2014, an experimental live television broadcast of important Court hearings has begun. Tova Zimoki, *Starting from Next week: The Supreme Court Goes on Live Broadcast*, YNET, Sept. 3, 2014 (Isr.).

audience standing while the judges enter the courtroom; the judges sitting on a podium presiding above the audience—create a mystical and formal atmosphere. The sense of expertise, of established order and deference to authority are well transmitted through such pictures.¹⁸⁶

People tend to trust the visual more than the verbal message.¹⁸⁷ Moreover, pictures tend to short-circuit introspection and logical reasoning.¹⁸⁸ It is not surprising then that James Gibson and Gregory Caldeira conclude, based on their extensive empirical research examining the American public's support for the Supreme Court, that "[t]o know courts is indeed to love them, in the sense that to know about courts is to be exposed to these legitimizing symbols."¹⁸⁹ They assert that "exposure to the legitimizing symbols of law and courts is perhaps the dominant process at play."¹⁹⁰ In this spirit the committee that made the decision regarding the architectural model for the Israeli Supreme Court's new building noted that their criterion for selection was achieving equilibrium between "awe-inspiring" and "practical considerations."¹⁹¹ There is no doubt that, since the Court moved to its new building, in 1992, the pictures of the Court building broadcast on television reflect this sense of "awe-inspiring" majesty.

For years Gibson and Caldeira tried to establish "the theory of positivity bias" in order to account for how courts gain institutional legitimacy.¹⁹² According to their theory, "anything that causes people to pay attention to courts – even controversies – winds up reinforcing institutional legitimacy through exposure to the legitimizing symbols

186. Cf. DAVIS, *supra* note 69, at 12-13 ("The courtroom in which the justices sit in public session reinforces legitimacy and expertise The rituals of the Court act to perpetuate the mystique of the Court.")

187. See PERI, *supra* note 8, at 15-16 ("[T]ELEVISION PLAYS TO THE EMOTIONS RATHER THAN TO THE RATIONAL CAPACITIES OF THE VIEWER – SOMETHING THAT DERIVES FROM THE ESSENCE OF THE MEDIUM.").

188. See POSTMAN, *supra* note 8, at 103.

189. James L. Gibson, Gregory A. Caldeira & Lester Kenyatta Spence, *The Supreme Court and the US Presidential election of 2000: Wounds, Self Inflicted or Otherwise?*, 33 BRIT. J. POL. SCI. 535, 553 (2003).

190. *Id.*

191. YOSEF SHARON, *THE SUPREME COURT BUILDING 25* (1993).

192. See James L. Gibson, *The Evolving Legitimacy of the South African Constitutional Court*, in JUSTICE AND RECONCILIATION IN POST-APARTHEID SOUTH AFRICA 229, 233 (Francxois du Bois and Antje du Bois-Pedain eds., 2008).

associated with law and courts.”¹⁹³ Recently, they took a step back. In their 2009 book, they partly retracted their earlier statements and explained that “[i]n our earlier investigations of Court support we have come close to arguing that virtually anything that stimulates citizens to pay attention to courts enhances institutional legitimacy [W]e were wrong: there are indeed circumstances in which increasing exposure weakens legitimacy.”¹⁹⁴ Based on the sharp decline in the support for the Israeli Court, I did not follow their “positivity bias” thesis in the first part of this project.¹⁹⁵ Writing this Article strengthened my skepticism of this thesis. Legitimizing symbols have an important effect of the portrayal courts in television, but when the general prism through which a court is presented shifts they do not dominate the coverage. When the prism through which a court is presented is political, it is hard to see how pictures of symbols, impressive as they are, can alone suppress the influence of the political framing on public opinion.¹⁹⁶

VIII. COMPETING THEORIES

No work to date has shown, based on empirical findings, the shift in the way the Court was presented to the public. Yet scholars, judges and journalists who have attempted to explain the sharp decline in the Court’s public support did offer explanations for the shift in the Court’s public image. In this section I examine three explanations of the shift in the Court’s public image in television coverage during the 1990s that offer paths that are different to my “change the medium theory.”

193. JAMES L. GIBSON & GREGORY A. CALDEIRA, *CITIZENS, COURTS, AND CONFIRMATIONS* 3 (2009).

194. *Id.* at 127.

195. See Bassok, *supra* note 2, at 357-58 & n. 245 (“[T]he relatively low media coverage of the Court, even during the 1980s, sheltered the Court’s ‘descent to the center of the public debate’ from the public eye, thus minimizing chances for any real harm to the Court’s legitimacy even if the mythical image were seriously eroded in coverage.”).

196. Cf. GIBSON & CALDEIRA, *supra* note 193, at 127 (“We are, we contend correct that most instances of the heightened salience of the judiciary involve exposure to legitimizing symbols. But not all events are focused on such symbols . . . the content of some events portrays courts politically [T]he bias of positivity is not absolute.”); Gibson, *supra* note 192, at 234 (“Exposure produces a positivity bias in the sense that even when the initial stimulus for paying attention to courts is negative (e.g., a controversial court decision), judicial symbols enhance legitimacy, which shields the institution from attack based on disagreement with its decision.”).

1. Elite-based explanations are the most popular route taken to explain the rise of judicial power in Israel. According to this line of thinking, hegemonic elites that had experienced a decline in their electoral power attempted to secure their interests over the preferences of the multitude by empowering the counter-majoritarian judiciary.¹⁹⁷ In line with this explanation, one may argue that rather than a change in the medium, the change in the coverage of the Court was a result of a change in the elites who controlled the media. According to this line of thinking, the elites who gave the Court its power had already shifted their position during the 1990s (and some argue even during the 1980s¹⁹⁸) rather than after

197. See, e.g., Mandel, *supra* note 66, at 279-82 (arguing that the rise of power of the Court is part of an effort to preserve the hegemony of an elite that had lost its appeal to the electorate); HIRSCHL, *supra* note 12, at 50 (“[T]he process was steered by an ad hoc cross-party coalition of politicians representing Israel’s historically hegemonic (albeit increasingly challenged) secular Ashkenazi elite in association with economic and judicial elites who had compatible interests.”); MAUTNER, *supra* note 17, at 143-48 (describing the failure of the Jewish-secular-liberal group in election politics that led them to empower the Court).

198. Doron Navot and Yoav Peled argue that “[d]uring the second half of the 1980s, the Labor Party and some members of the business elite began to resist the further empowerment of the SC.” They further add that “[t]he ‘constitutional revolution,’ we argue, was meant to institutionalize the rights regime established in the previous decade, in view of the growing skepticism displayed towards that regime and towards the SC by the Labor Party and by segments of the business elite.” Doron Navot & Yoav Peled, *Towards a Constitutional Counter-Revolution in Israel?*, 16 *CONSTELLATIONS* 429, 430, 433-34 (2009). The authors further claim that “[t]he animosity that parts of the economic elite were developing towards the SC in this period can be explained through the *Ganor* case in which the SC overturned a decision by the AG to refrain from indicting Israel’s leading bankers, who had caused their banks to collapse through illegal manipulation of their stocks in the late 1970s and early 1980s Thus, the SC was seen as beginning to threaten the freedom of action enjoyed by the economic elite that was, at that time, closely related politically to Labor. Shortly before the 1992 elections, which Labor was expected to win, a liberal coalition in the Knesset, made up of members of Likud and Shinuy, a small liberal party, was able to affect the passage of the two human rights laws that constituted the ‘constitutional revolution.’” *Id.* 433. It should be noted that the authors’ historical claims contradict the works of Mandel, Mautner and Hirschl (among others) who view the rise of judicial power as an attempt of elites connected to the Labor party and the business community to fortify their power by empowering the judiciary. See *supra* note 197. *Shinuy*, the party most affiliated with the business elite continued throughout its existence to be the most avid supporter of the Court. Yet, the authors argue that this party cooperated with the *Likud* in order to enact the 1992 Basic Laws and give power to the Court against the will of the business community!

2005 as several scholars argue.¹⁹⁹ Since the same elites controlled the media, the change in coverage was just another expression of this shift in the elites' position.²⁰⁰

There is no doubt that, unlike in the past, by the mid-1990s parts of the secular elites were no longer avid supporters of the Court. In this spirit, Moshe Goral, the courts' spokesperson between 1996 and 1999, claimed that "in terms of attacks on courts, the 'taking off the gloves' phase occurred with the election of Netanyahu to prime minister, through the axis of Netanyahu-Liberman and Hoter-Ishay."²⁰¹ Yet at least with regards to the media, scholars contest this line of thought and claim that journalists were still, at least in the years covered by this Article, part of the "old" guard that supported the Court.²⁰² Moreover, a survey conducted in December 2004 among a representative sample of Israeli journalists showed a high level of trust in the Supreme Court, much higher than that of the general public.²⁰³ A study based on interviews with thirty-two journalists who covered the Court during the last decade also supports this conclusion. The study concludes that "the traditional view of the importance of an independent judiciary for achieving justice, and the perception of the basic validity of the law and trust of those who work in its service," still have a strong hold among journalists.²⁰⁴ Hillel Sommer suggested (without systematic empirical evidence), that until 2007 the media kept "Barak's Court" protected with a "cotton wall . . . like a Citron."²⁰⁵

Sommer's quotes of journalists admitting their favorable bias toward the Court until around 2007 may correctly describe their orientation, yet

199. See the text accompanying note 88.

200. Cf. ROBERT H. BORK, COERCING VIRTUE – THE WORLDWIDE RULE OF JUDGES 9 (2003) ("Beyond that, the prestige of a judge depends on being thought well of in universities, law schools and the media, all bastions of the New Class.").

201. Moshe Goral, *With One Hand Tied Behind the Back*, GLOBES, Dec. 11, 2000, at 81 (Isr.).

202. PERI, *supra* note 8, at 13, 157, 251 (quoting columnist Nachum Barnea's explanation that since the media was "the stronghold of the old guard," Prime Minister Netanyahu's idea to replace the old elites, made him the media's enemy).

203. ASHER ARIAN, PAZIT BEN-NUN, SHLOMIT BARNEA, & YARIV TSFATIM, THE MEDIA AND ISRAELI DEMOCRACY: A VARIETY OF VANTAGE POINTS 13, 16-17 (2005) (Isr.).

204. Anat Peleg & Bryna Bogoch, *Removing Justitia's Blindfold: The Mediatization of Law in Israel*, 34 MEDIA, CULTURE & SOC'Y 961, 974 (2012).

205. Sommer, *supra* note 122, at 535-37.

certain biases of commercial media, its production values were stronger than any personal views of the reporters covering the Court.²⁰⁶ During the 1990s it is unlikely that any journalist in Channel One wished to shatter the Court's mythical image, yet this development was determined by the shift in the nature of the medium that dictated the message.²⁰⁷

Take for example the Israeli media's coverage of Israel's relationship with Jordan after the 1994 Israeli-Jordanian peace agreement. Journalists were extremely supportive of the peace agreement, yet media logic explains why, after the euphoria of the peace treaty passed, the media lost interest and barely covered the developing relationship between the two societies. Media coverage increased only in dramatic, isolated and particularly negative incidents. For example, when a Jordanian soldier killed seven schoolgirls who were visiting the border area on a school trip, all the news editions began with coverage of this deadly incident.²⁰⁸ Similarly, following the entrance of the commercial channel, a change in the medium brought a different type of coverage for the Court, even though most journalists probably still had great confidence in it. The medium is indeed the message.

2. Some scholars attribute the shift in the Court's public image to the constitutional revolution's shaky normative basis.²⁰⁹ As explained above,²¹⁰ I am hesitant to adopt explanations that put too much emphasis on the constitutional revolution as a cause for the change in the way the Court was imagined. Writing in hindsight, scholars today view the normative problems they detect in the Court's constitutional move as so evident that they attribute the change in public perception of the Court to these problems. But a change in the Court's public image in television coverage is not necessarily the result of decisions that are normatively flawed. The assumption that normative problems that shout in a loud

206. See BOURDIEU, *supra* note 110, at 38 ("Television is a universe where you get the impression that social actors – even when they seem to be important, free, and independent... are puppets of a necessity that we must understand, of a structure that we must unearth and bring to light.")

207. See *id.* at 45.

208. Gadi Wolfsfeld, Yoram Peri & Rami Khouri, *News about the Other in Jordan and Israel: Does Peace Make a Difference?*, 19 POL. COMM. 189, 206 (2002).

209. See, e.g., SAPIR, *supra* note 122, at 162-63 (connecting between the constitutional revolution, the loss of the Court's image as a neutral institution and the decline in public support for the Court); Hofnung, *supra* note 36, at 36.

210. See the text accompanying notes 126-131.

voice at the scholar's table will necessarily be translated immediately to a change in the public's perceptions is unrealistic.²¹¹

In public discourse the Court's new authority to review legislation was not central during the first years following the constitutional revolution, if only for the reason that the Court rarely used it. Even when the Court did use this authority, the cases it chose were not at the center of the political debate.²¹² Indeed, criticism of the Court's judicial review authority *per-se* is not very present in television coverage between 1993 and 1996.

3. The retired President of the Court, Dorit Beinisch, argued that the decline in public support for the Court was a result of Justice Minister Daniel Friedmann's "unjustified" attacks on the Court between the years 2007 and 2008. She added that parts of the media supported the attacks on the Court.²¹³ Beinisch was highly critical of the media coverage of the Court, noting that the media covered the controversy between her and the Justice Minister Daniel Friedmann as if it were a *telenovela*.²¹⁴ According to this line of thought, the Court's image in the media changed only following Friedmann's attacks. Several journalists supported Beinisch's claim and argued that, due to personal rivalries of certain journalists, some news organizations began a well-orchestrated campaign in favor of Friedmann and against the Court.²¹⁵ Yet there is no way of getting around the fact that the decline in public support for the Court began at the beginning of the century,²¹⁶ while Friedmann's harsh

211. See Or Bassok, *A Decade to the 'Constitutional Revolution': Israel's Constitutional Process from a Historical-Comparative Perspective*, 6 MISHPAT UMIMSHAL 451, 499-500 (2003) (Isr.) (predicting based on a comparative historical analysis that even though the Israeli Constitution was enacted in a flawed manner, it will gain public legitimacy in an evolutionary process).

212. See, e.g., RUBINSTEIN & MEDINA, *supra* note 77, at 15 (noting that the Court has been restrained in constitutional issues and that it has refrained from striking down legislation almost completely besides in three cases (as was true for the beginning of 2005)).

213. Dorit Beinisch, Address at the Beginning of the Year Ceremony at the IDC (Oct. 26, 2008) (Isr.).

214. Aviram Zino, *Beinisch: One Can Think that I am a Telenovela Star*, YNET, Nov. 23, 2007 (Isr.).

215. See Ehud Asheri, *Behind the Lines/ Wholly Mozes*, HAARETZ, Nov. 23, 2007 (Isr.); Uzi Benziman, *Yellowing the Grass*, HAARETZ, June 12, 2007 (Isr.).

216. See Bassok, *supra* note 2, at 307 (surveying studies on the decline in public support).

critique began only in 2003, and he was appointed to the position of minister of justice only in 2007. Thus, Beinisch's causal story cannot explain the change in the Court's image in television coverage after 1993. Nor can it explain the initial decline in public support for the Court at the beginning of this century.

The mythical image did not completely disappear from the coverage of the Court between 1993 and 1996. And yet, as a result of the change in medium, items covering controversies over the selection of judges which in the past were unthinkable started appearing on the screen after 1993. Coverage of politicians arguing that judges were pushing a political agenda signaled that the Court was no longer presented as distinct from the political arena. Television coverage no longer presented only items covering the Court as a professional, apolitical, consensual institution. The Court was not only covered much more extensively, but it was also presented in a more political fashion and its image of detachment from politics eroded significantly. Controversies on the Court's decisions and authorities were presented on many occasions as personal conflicts between the Court's president and politicians. The Court was no longer sacred in television coverage. Its coverage became more and more similar to the coverage of political institutions.

Of course, without the Court's involvement in the political arena as a result of changes in its adjudication that began during the 1980s, one can safely assume that the media would not have covered it to the same extent. Yet the change in the Court's adjudication was not sufficient for the shattering of its mythical image. Indeed, the major shift in the Court's adjudication occurred during the 1980s, while the media continued to portray the Court through a mythical prism.²¹⁷ Only as a result of the entrance of commercial television did the prism through which the public view the Court in Channel One's news edition changed significantly. This shift in the medium, rather than a change in the Court's adjudication

217. *Id.* at 357-58 ("Television's only channel, for twenty-five years continued to portray the Court in mythical terms."). The Court's deficient "strategic behavior" in some of its decisions may have also contributed to the shift in the Court's public image. *See* SHAI DOTHAN, REPUTATION AND JUDICIAL TACTICS 163-212 (2014) (analyzing the Court's strategic behavior and the executive branch's response to its decisions in view of the decline of public support for the Court). The question of whether the judges' deficient strategic behavior was a result of their difficulty in adjusting to the new media reality is a complicated one and is beyond the scope of this Article.

or in journalists' disposition toward the Court, shattered the mythical image of the Court.

CONCLUSION

The existence of high levels of public support for national high courts in many countries worldwide is a perplexing phenomenon.²¹⁸ According to current prevailing comparative theories, the worldwide phenomenon of judicial empowerment in various countries is the work of political, economic, and judicial elites securing their interests over the preferences of the multitude.²¹⁹ Yet if national high courts act in the name of elites "insulating policy making in general, and their policy preferences in particular, from the vicissitudes of democratic politics,"²²⁰ how is it that these courts have received high public support in opinion polls over a long period of time?²²¹

Israel has served for many years as "exhibit A" in these accounts of the rise of judicial power.²²² Until the new millennium the rise in the Israeli Supreme Court's power was not followed by any loss in its public support. The sharp decline in the Court's public support during the beginning of the 21st century is thus an important development.²²³

218. See Bassok, *supra* note 2, at 376-80 (presenting the puzzle).

219. See HIRSCHL, *supra* note 12, at 11-12, 16, 37-40, 43-44, 47-49, 98-99, 169-72, 199, 210-18 (analyzing elites seeking to insulate their policy preferences from the vicissitudes of democratic politics); See BORK, *supra* note 200, at 1, 8-9; TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES 18, 24-26, 30-33 (2003) (arguing that judicial review in new democracies is created by political elites that at the time democratization occurs foresee themselves losing in elections and thus seek to entrench judicial review as a form of "political insurance"); Rogers M. Smith, *Judicial Power and Democracy: A Machiavellian View*, in THE SUPREME COURT AND THE IDEA OF CONSTITUTIONALISM 199, 204-07 (Steven Kautz et al. eds., 2009) ("Powerful judiciaries are at bottom not partners of modern democracy, but efforts by elites to retain hegemony within them, as a Machiavellian analysis would lead us to expect.").

220. HIRSCHL, *supra* note 12, at 11-12.

221. Bassok, *supra* note 2, at 377-80 ("If these courts have been preserving the interests of elites whose public support is eroding, if 'an activist judiciary helps to advance the ends that democratic branches of government would never sanction,' how do these courts succeed in preserving their public support over a long period of time?").

222. See, e.g., Hirschl, *supra* note 11, at 476 ("Israel is arguably one of the world's prime examples of a fully-fledged juristocracy.").

223. See Bassok, *supra* note 2, at 306-07.

The primary mechanism linking the general public and courts has been the mass media, and in particular, television.²²⁴ Much has been written on mass media's power (especially television's power) to shape the public's perception of social reality and to serve as "the common storyteller of our age."²²⁵ In the American context, scholars agree that the public's beliefs concerning the Supreme Court and support for it are closely related to the way in which the media covers the Court.²²⁶ It seems reasonable to conclude that public support for the Israeli Court is also dependent, to a large extent, on the construction of the Court's image in media coverage.²²⁷ Since the sociological legitimacy of the Supreme Court in Israel was based on its mythical image,²²⁸ the shattering of this image in television coverage after the entrance of the commercial channel may have significantly contributed to the erosion of the Court's public support. This conclusion corresponds well with a contested theory in American media scholarship known as "videomalaise." According to this theory there is a connection between reliance on television journalism and public mistrust of governmental institutions.²²⁹ Indeed, commercial media that is biased toward sensationalist coverage has negative consequences on the public's perceptions and assessments of the American Supreme Court.²³⁰

224. *See id.* at 312-13.

225. MOY & PFAU, *supra* note 43, at 45, 86; *see also* NIKLAS LUHMANN, *THE REALITY OF MASS MEDIA 1* (2000) ("[W]hatever we know about our society, or indeed about the world in which we live, we know through the mass media.").

226. Keith J. Bybee, *Introduction* to *BENCH PRESS: THE COLLISION OF COURTS, POLITICS, AND THE MEDIA 2* (Keith J. Bybee, ed., 2007) (explaining that the public's conflicting understandings of judicial power "are closely related to the way in which the media covers the courts."); SLOTNICK & SEGAL, *supra* note 54, at 119 ("Much of what the public might glean about a Supreme Court decision's importance, implications, and impact could be influenced by predictions and assertions made on network newscasts.").

227. *See* Bassok, *supra* note 2, at 312-16.

228. *See* Barzilai, *supra* note 20, at 21, 25-26, 30; Barzilai, *supra* note 21, at 790.

229. *See* MOY & PFAU, *supra* note 43, at xiv, 70, 117-23 ("[N]etwork news viewing had a significant negative impact on individuals' global attitude toward and trust in Congress Watching network news had a direct, negative impact on one's global attitude . . . and trust in the court system . . .").

230. *See* Johnston & Bartels, *supra* note 62, at 262-63, 273 ("[W]e find that higher levels of exposure to sensationalist relative to sober media sources predict more negative attitudes toward the Court.").

Understanding the relationship between public support and the Court's work is not merely a question of whether the Court's work can be justified in theoretical-normative terms. The manner in which scholars imagine the Court and justify its authority does not always correspond to the common perception of the Court or the manner in which the public justifies its authority.²³¹ As Lawrence Friedman explained, "the public learns its law from the evening news, in tiny bites that convey upshots, not theories, results, not reasoning. The jurists and system-makers are talking only to each other."²³²

In order to understand the decline in public support for judicial power in Israel, one needs to examine not merely flaws in the justifications for the Court's newly acquired power of judicial review, but also the portrayal of the Court in the media.

By the end of 1996 the Court's mythical image was partly shattered. It was shattered not in the sense that remnants of this image disappeared completely from media coverage and public discourse. Indeed, the mythical image continues to influence coverage even today. But it was shattered in the sense that – even in television coverage that cannot afford too much time for reflective thinking and thus for avant-garde thoughts²³³ – ideas such as the political nature of the Court became clichés. Thus, when President Barak objected in 2005 to the appointment of Ruth Gavison to the Court because she has an "agenda,"²³⁴ his argument was fiercely rejected in public discourse, even by those who objected to Gavison's appointment to the Court.²³⁵ It was rejected not because people argued that Gavison lacked such an agenda, but because

231. See Or Bassok, *The Sociological-Legitimacy Difficulty*, 26 J.L. & POL. 239, 268 (2011) ("[N]ormative justifications of judicial review, even if valid, may not save the Court's descriptive legitimacy from erosion. The public may remain ignorant of such normative justifications, or reject them despite their plausibility on the professor's writing table.").

232. Lawrence M Friedman, *Law, Lawyers, and Popular Culture*, 98 YALE L. J. 1579, 1604-05 (1989).

233. See BOURDIEU, *supra* note 110, at 28-29 ("[T]elevision rewards a certain number of *fast-thinkers* who offer cultural 'fast-food' . . .").

234. See Yuval Yoaz, *Supreme Court Head Barak Explains Opposition to Gavison Appointment*, HAARETZ (Nov. 13, 2005), <http://www.gavison.com/a2673-supreme-court-head-barak-explains-opposition-to-gavison-appointment>.

235. See, e.g., Matti Golan, *Yes, Everything is Justiciable*, GLOBES (Nov. 14, 2005) (Isr.).

they claimed that Barak also had an agenda. Two decades earlier, at a time when the Court's mythical image controlled the imagination of Israelis, acknowledging that a candidate had a political agenda would have disqualified her candidacy to an apolitical Court. Indeed, the mythical image was so strong that in 1983, before its collapse, a judge was framed in coverage as apolitical even while he ran for presidency as a candidate of the *Likud* party.²³⁶ But in 2005, after the shattering of the mythical image, it was no longer possible to express in public discourse the idea that the Court was a "neutral" or "apolitical" institution without being laughed at.

236. Bassok, *supra* note 2, at 343.

